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Correspondence should be addressed to:

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Ten years of CMEA legal conference

J. SZILBEREKY
President of the Supreme Court

The introductory part of the paper deals with the significance of the socialist economic integration and with the nature of Council of Mutual Economic Aid (further on: CMEA). It refers to the results achieved in the social and economic development of the member-countries of CMEA but also to the problems arisen in the recent years.

In respect of the improvement of efficiency of co-operation, the accomplishment of the Complex Program adopted in 1971 as well as the realization of long-range complex objective programs of co-operation developed since then are of fundamental importance. All these require the suitable provision for the organizational and functional conditions of CMEA. Therefore, the establishment of the legal foundations of the socialist economic integration, the building up and perfection of the regulation are important means belonging to the system of conditions of the integration. The appropriate legal mechanism may constitute suitable assistance to the efficient functioning of the economic integration. In order to build up the legal mechanism of CMEA, at the end of 1969 a permanent organ of CMEA, the Legal Conference of the member-countries was established. In the past 10 years this Conference considerably contributed by the means of law to the structural building up and to the development of the functioning of the socialist economic integration. Development methods of legal foundations are as follows: elaboration and adoption of normative acts regulating the economic and scientific-technical co-operation, regulation of the order of the litigation, harmonization and unification of the national legal norms, establishment of general legal norms. The forms of this latter are the agreements between the countries as well as the recommendations of CMEA organs to the countries.

Chapter 15 of the Complex Program defines the most important tasks of the legal work. The paper treats the work hitherto done according to the system of Chapter 15 of the Complex Program.

The hitherto displayed legal activity comprises the following fields:

—Elaboration of recommendations for harmonization of the national economic plans and of the investments relating to some objects of common interest.—Elaboration of legal norms concerning the field of the specialization of production and the co-operation.—Elaboration of statutory provisions for the co-operation in the scientific and technical research work.—Elaboration of principles relating to the liability of the countries.—Taking measures for the harmonization of national legal norms relating to the economic and scientific-technical co-operation of economic, technical and other organizations established by the member-countries.—Further development of the General Conditions of Delivery (1968) between the organizations of the member-countries of CMEA. Further development of the system of norms relating to the liability of the economic organizations in case of a failure or faulty performance of obligations.—Elaboration of model-rules relating to the foundation and to the conditions of activity of the international economic organizations of the member-countries of CMEA.—Questions relating to the legal protection of inventions, trademarks and designs as well as elaboration of model-contracts of licence.—Elaboration of an agreement relating to the arbitration in legal disputes arising in the course of economic co-operation.—Elaboration of a treaty on the legal position and the immunity of the inter-state economic organizations active in a definite field of co-operation.—Provisions for the exchange of legal experiences and informations.

According to the paper, the survey of the work indicates that the activity displayed in ten years by the Legal Conference of CMEA serves with good results the provision for legal conditions of the co-operation of the member-countries.

I. The *significance of the economic integration of socialist countries* increases. Thirty years after the establishment of the Council of Mutual Economic Aid (further on: CMEA) it is obvious that the member-countries of CMEA have developed qualitatively new economic relations. This economic community differs from all other international economic groupings since it is based on voluntary principle, on mutual advantages, on the aid, and it does not constitute a supra-national organization, is not directed against the interests of any non-member country and it does not impede the economic relations of its member-countries to any other country of the world.

Since the foundation of the socialist economic community *considerable results* have been produced. This fact is proved by the social and economic development of the member-countries of CMEA.

In the last decade the economic development of the member-countries of CMEA can be considered significant as compared either to the world economy or to any other regional economic grouping. Thirty years ago the CMEA member-countries manufactured 17.8 per cent of the industrial production of the world, today this share amounts to 33 per cent. The industrial production per one person has increased on world scale by 3.2 per cent during these thirty years. This increase has been threefold in the member-countries of CMEA as compared to the above world average. The progress in the agriculture and in the food production is also significant. The production per one person has increased in the last twenty years on world-scale by 7 per cent, whereas in the CMEA countries by 31 per cent.

The most important fact is, however, that the *socialist international labour division has promoted* to the possibilities of the development of socialist economic system within the individual countries. The productivity has increased, the production structure has been modernized and the living standards of the inhabitants of CMEA-countries not only increased but—where differences were to be found—also approached to each other.

Beside the above-mentioned results surveyed schematically, there are also problems in the economy of all socialist countries. In 1980 the agricultural production declined in some countries. The increase of national income achieved the planned value only with difficulties. In consequence of these there are still many tasks to be solved, especially in view of the present situation having evolved at the world market. The most important is now the encouraging of the co-operation for increasing the efficiency of economy. From this point of view, the *enforcement of the Complex Program* adopted in 1971 at the 25th Session of CMEA as well as the *realization* of complex long-range *objective programs of co-operation* elaborated since that time are of fundamental importance.

These objective programs promote the systematic development in the most significant economic branches—such as energy, production of raw materials, machine

industry, agriculture, food industry, transport. Thereby also the interests of the member-countries of CMEA are efficiently served.[1]

2. The realization of the Complex Program requires the suitable provision for the *organizational and operational conditions of CMEA* and the development of working methods.

It is well known that the law is defined by the social conditions, the law is therefore secondary as compared to the economy. At the same time, however, the law is relatively independent, it has its own structural rules, institutional system and sanction system. All these relate also to the legal regulation of economic relations. The law has, therefore, an important role in the settlement and management of economic processes, in the solution of the evolving conflicts. Accordingly, *the establishment of the legal foundations of socialist economic integration, the development and perfection of legal regulation are important means belonging to the system of conditions of integration.* The appropriate legal mechanism may be a suitable help to the efficient functioning of economic integration.

The legal mechanism of socialist economic integration may be systematized in several ways, its legal institutions are of several types. The legal regulation is diverse considering its object, its form, moreover, its legal nature.[2]

The aim of the legal basis, of the legal system is, however, uniform; that is the promotion and ensuring of economic integration and scientific-technical co-operation by the specific means of law.

3. In order to *establish and develop the legal mechanism* necessary for the organization of economic relations of member-countries of CMEA in December 1969 the *Legal Conference of the member-countries*, as a permanent organ of CMEA has been called into existence.

It is obvious that even before the establishment of the Legal Conference—i.e. before 1969—there already was a legal activity displayed with the CMEA and important documents and rules were elaborated. It is enough to refer e.g. to the Charter of CMEA or to the system of legal norms of liability for the economic obligations of organizations of the member-countries, to the General Conditions of Delivery of Goods on the sale of goods between the organizations of the member-countries, etc.

It is also a matter of course that after the Legal Conference has been established, other permanent organs deal also with legal questions, especially the Committee of Scientific-Technical Co-operation, the Permanent Committee of Foreign Trade, the Permanent Committee of Currencies and Finance, the Permanent Committee of Leaders of Patent Offices, etc. The speciality of the arising legal questions justifies in

[1] Cf. MARJAI, J.: *30 éves a KGST* (30 years of CMEA), Közgazdasági Szemle, 7–8/1979.

[2] GRINGOLZ, I. A.: *A KGST tagországok szocialista gazdasági integrációja jogi mechanizmusának tökéletesítéséről* (On the improvement of the legal mechanism of socialist economic integration of the member-countries of CMEA) Magyar Jog, 2/1973.

given cases the procedure and attitude of these special committees and other organs of CMEA in legal questions.

The Legal Conference has been, however, since its establishment, the permanent special legal organ of CMEA having in a certain sense general competence which *during the past ten years significantly contributed by the means of law to the organizational extension of socialist economic integration and to the development of its activity.*[3]

4. The most important tasks and directions of the work to be done for further developing the legal bases of the co-operation of the member-countries of CMEA are defined in Chapter 15 of the Complex Program.[4]

The legal bases of the co-operation are further developed in the following manner:

a) the drafting and adoption of *normative acts* regulating the economic and scientific-technical co-operation between the member-countries of CMEA and between their economic and other organizations as well as the activity of international economic organizations of the member-countries;
b) the regulation of the methods and order of *settlement of disputes* arising in the co-operation;
c) *the harmonization and unification of* the corresponding *national legal norms.*

One of the most important duties is the development of a general legal system providing for the most favourable legal conditions of the progress of socialist economic integration.

For this purpose, the member-countries of CMEA agreed upon to draft the general legal norms and conditions of the co-operation between these countries in the following fields:

a) the harmonization of the national economies and, within it, the harmonization of investments of objects of common interest;
b) the specialization of production and co-operation;
c) the co-operation asserting itself in the field of scientific and technical researches and, within it, the transfer and application of scientific-technical documentation and information, technological assistance and delegation of experts;
d) the legal position of organizations and enterprises established by the interested countries on the territories of the CMEA member-countries.

The forms of the above-mentioned general legal norms and conditions are the *conventions* of the countries, as well as the *recommendations* of CMEA organs for the member-countries.

[3] Szász, I.: *A KGST integráció jogi mechanizmusa* (Legal mechanism of the integration of CMEA), Jogtudományi Közlöny, 4/1979.

[4] Kalensky, J.–Kohout, A.: *A KGST tagállamok nemzetközi gazdasági integrációjának jogi kérdései* (Legal questions of international economic integration of the member-states of CMEA), Magyar Jog, 12/1972.; Usenko, T. J.: *A szocialista gazdasági integráció jogi vonatkozásai* (Legal relations of the socialist economic integration), Magyar Jog, 5/1974.

The activity of the Legal Conference may be summarized in the system of Chapter 15 of the Complex Program as follows:

4.1. The drafting of statutory provisions is necessary *for the harmonization of national-economic plans and of investments of objects of common interest* (Complex Program, Chapter 15, para 2).

For the investigation and elaboration of the above-mentioned questions a working group has been established which prepared in 1976 a report summarizing the legal questions of the co-ordination of national-economic plans and a report in 1977 which dealt with the legal questions of common planning of the individual industrial branches and production types of the interested countries.[5]

The reports contain general provisions defining the notions of the co-ordination of plans and the common planning, of the subjects participating in the co-ordination and planning, moreover, they contain some dispositions on the organizational-legal questions of the work to be done in this field. The Legal Conference approved these two reports and the Secretariat of CMEA forwarded them to the Committee of Planning Co-operation of CMEA.

Since the CMEA-organizations elaborated the long-range co-operation programs, an exchange of opinions on the legal character of these programs took place in the framework of the Legal Conference. According to the commission of the Council, the Secretariat of CMEA notified the Committee of Planning Co-operation of CMEA and the working organs of this Committee that according to the point of view assumed by the Legal Conference it would be expedient to endue the objective programs with the same legal form as the Complex Program adopted at the 25th Meeting of the Session of CMEA, i.e. they would be accepted in form of CMEA recommendations. Essentially, this has turned into practice since that time.

4.2. *The drafting of legal norm is necessary for the co-operation developing in the field of specialization of production and of the co-operation* (Chapter 15, para 2).

In the framework of the Conference a report surveying the legal questions relating to the formation of contracts on the specialization of production and on co-operation has been elaborated.

The provisions contained in the report define the subjects of contractual relations of the specialization of production and of the co-operation, their structure and nature, they deal with the contractual partners; with the form and order of contracts; with the liability of partners in case of faulty performance of obligations undertaken in connection with the contract on the specialization of production and on co-operation. Some provisions relate to the question which substantive laws shall be considered decisive for the relations of parties resulting from such contracts how the litigations shall be judged, etc.

[5] KÁLMÁN, GY.: *A népgazdasági tervek KGST országok közötti koordinációjának jogi kérdései* (Legal questions of the co-ordination of national-economic plans between CMEA-countries), Magyar Jog, 11/1976.; GEORGIEV, G.: *A KGST tagországok közös tervezésének jogi problémái* (Legal problems of the common planning in the member-countries of CMEA), Magyar Jog, 5/1977.

The report was approved in the 65th meeting of the Executive Committee; the Executive Committee has recommended to the member-countries of CMEA to see that their economic organizations take into account the provisions of the report in question with the formation of contracts on the specialization of production and on co-operation to such an extent as held necessary by the states themselves. At the same time, the Executive Committee entrusted the CMEA organs to take into consideration in their activities the provisions of the said report, and to apply the provisions of the report in the practice.

The working group of the Legal Conference completed the draft of the General Conditions of the specialization of production and of the co-operation between the organizations of the member-countries of CMEA.

The draft of General Conditions was submitted to the 17th meeting of the Council and was approved by it.

The Executive Committee of CMEA approved the draft in January 1979 and on the strength of its recommendation the normative document containing the general conditions of the specialization of production and of the co-operation between the organizations of member-countries has entered into force by January I, 1980 in the member-countries.[6]

In accordance with the decision of the Legal Conference the investigation of legal questions of interstate relations connected with the specialization of production and with co-operation between the member-countries of CMEA has also been started.

4.3. *Elaboration of general legal norms and conditions for the co-operation in the field of scientific and technical research* (Chapter 15, paras 2 and 5).[7]

In October 1972 the Executive Committee approved the document on "Organizational-methodical, economic and legal bases of the scientific-technical co-operation between the member-countries of CMEA and of the activity displayed in the framework of CMEA-organs, relating to this field" prepared by the Committee for Scientific-Technical Co-operation of CMEA.

The general provisions of the document define the order of consultations in respect of the scientific-technical policy, of the scientific-technical prognostic co-operation, of the planning and basic forms of the co-operation in the field of scientific

[6] Soós, L.: *A KGST gyártásszakosítási és kooperációs szerződések normatív szabályozásának kérdései* (Problems of the normative regulation of contracts on the specialization of production and co-operation in CMEA), Jogtudományi Közlöny, 10/1976.; Szilágyi, L.: *A KGST tagországok gazdálkodó szervezetei közötti gyártásszakosítás és termelési kooperáció jogi alapjainak fejlődése és a soron következő koordinációs feladatok* (Development of the legal bases of the specialization of production and the productive co-operation between economic organizations of the member-countries of CMEA), Magyar Jog, 4/1979.; Juhász, J.: *A KGST tagországok szervezetei közötti termelésszakosítás és kooperáció általános feltételei* (General conditions on the specialization of production and co-operation between the organizations of member-countries of CMEA), Jogtudományi Közlöny, 10/1979.

[7] Schönfeld, G.: *A tudományos-műszaki eredmények átadásának jogi problémái a KGST tagállamok tudományos-műszaki együttműködésének keretében* (Legal problems of the transfer of scientific-technical results in the framework of the scientific-technical co-operation of CMEA-countries), Magyar Jog, 5/1976.

and technical research, of the budgeting of such research works, as well as those of the conditions of the transfer and application of the scientific-technical results.

The Committee for Scientific-Technical Co-operation of CMEA has been charged to complement, if necessary, the document on the basis of experiences gained in the scientific-technical co-operation.

In order to develop further the general legal system of scientific-technical co-operation between the member-countries of CMEA, several documents have been drawn up in the framework of the Legal Conference.

In 1975, the Legal Conference approved the draft of model-conditions of contracts relating to scientific research, planning-constructing and experimental works to be carried out on the basis of the co-operation, as well as the draft of the model-contract relating to the above-mentioned works. In 1977, the Conference approved the draft of an interstate model-agreement and that of the contract relating to the establishment of the temporary scientific-technical collective, as well as of the common laboratory (department). These drafts were deliberated by the Committee for Scientific-Technical Co-operation of CMEA and at its recommendation, the Secretariat of CMEA forwarded these drafts to the member-countries for using them at their discretion.

These documents are not of normative character, the organs and organizations of the member-countries of CMEA, however, apply them in the practice.

In accordance with the decision of the Legal Council the work is continued for developing further the legal regulation of the activity displayed in the co-ordination centres dealing with the assigned scientific and technical questions.

Several problems of the technical assistance and those of the delegation of specialists were also regulated.

4.4 *Elaboration of principles relating to the liability of states, establishment of the methods and order of settlement of disputes arising possibly between the countries in connection with the liability* (Chapter 15, para 3).

The working group investigating the questions relating to the liability of states elaborated the "Conditions of liability resting upon the states on the strength of economic and scientific-technical co-operation agreements" in accordance with the decisions of the Executive Committee and of the Legal Conference. The Legal Conference having deliberated this draft, submitted it to the 71th meeting of Executive Committe. The Conditions in question were approved by the 29th meeting (June 1975) of the Session of CMEA on the basis of the proposal of Executive Committee.

The provisions of the above-mentioned documents are not yet applied in the practice. That question is first to be settled to which types of agreements should the Conditions of Liability of States be applied.

The special working group considering the problem of the liability of states also dealt with such proposals according to which in the framework of CMEA an international arbitration court should be established for the settlement of disputes arising from the mutual obligations. In the course of the preliminary study of the

question the experts of the member-countries came to the conclusion that the elaboration of questions connected to the liability of states has not yet reached the phase when other methods and order than those applied in the present practice of member-countries would be justified for the settlement of disputes.[8]

4.5. Measures: a) *for the development of contractual relations and co-operation between the economic, technical and other organizations established by the member-countries;* b) *harmonization of national legal norms relating to the economic and scientific-technical co-operation activities of such organizations, as well as the unification thereof by the interested countries* (Chapter 15, para 4).

In accordance with the commission of the 72th meeting of the Executive Committee, the Legal Conference elaborated and submitted for deliberation in June 1976 to the Executive Committee its report in which the work done between 1970 and 1975 in the field of the further development of the legal bases of the co-operation was summarized; at the same time, the Conference submitted also its proposals relating to the legal questions to be outlined in the period between 1976 and 1980 of the economic and scientific-technical co-operation between the member-countries of CMEA. These proposals are contained in a draft-list enumerating the most important questions to be studied or elaborated in the next five years.

Item 10 of the above-mentioned list envisages the periodical study of national legal norms the harmonization or the unification of which by the interested countries would produce favourable legal conditions for the further intensification of the co-operation of CMEA-countries.[9]

The Legal Conference decided in its 15th meeting upon the comparative investigation of the following national legal norms:

a) secondary legal norms to be applied to contracts under the effect of General Conditions of Delivery accepted in CMEA;
b) elaboration of a working program for the compilation of terminological dictionary of the most important legal notions most frequently used in the legal documents of CMEA;
c) legal norms to be applied to contracts entered into in the field of economic and scientific-technical co-operation;

[8] KOLOSOV, J. M.: *Anyagi felelősség a KGST tagállamok közötti gazdasági kapcsolatokban* (Liability in economic relations of the member-states of CMEA), Magyar Jog, 3–4/1975.; KÁLMÁN GY.: *A KGST tagállamok anyagi felelőssége gazdasági kötelezettségvállalásaikért* (Liability of CMEA-countries for their assumption of economic obligations), Jogtudományi Közlöny, 7/1972, 11/1974.

[9] SEIFFERT, W.–ZIMMERMANN, B.: *A KGST tagállamok jogszabályainak közelítése és a jogösszehasonlító kutatások* (Harmonization of statutory provisions of the member-countries of CMEA and the studies in comparative law), Magyar Jog, 8/1974.; GRINGOLZ, I. A.: *A KGST tagországok jogszabályainak egységesítése és közelítése a szocialista gazdasági integráció folyamatában* (Unification and harmonization of statutory provisions of the member-states of CMEA in the course of the socialist economic integration), Magyar Jog, 4/1976.; RAJSKI, J.: *A jogközelítés és jogegységesítés a KGST keretében* (Harmonization and unification of laws in the framework of CMEA), Jogtudományi Közlöny, 7/1977.; VÖRÖS, I.: *Konferencia a nemzetközi jogrendszerek egyes területeinek harmonizálásáról a KGST-ben* (Conference on the harmonization of some fields of international legal systems in CMEA), Jogtudományi Közlöny, 6/1979.

d) in connection with the foundation and activity of international economic organizations, legal norms to be applied in the country of the headquarters of such organization;
e) rules of the conflicts of laws significant with respect to the economic and scientific-technical co-operation.

The Legal Conference designated the co-ordinator of each subject, i.e. the delegation of one country. It fixed the first subjects as well as the program of study and the deadlines. Accordingly, the delegation of the Hungarian People's Republic has compiled—on the basis of remarks and ideas obtained from the delegations of other countries—a questionary for the comparative investigation of some secondary national legal norms to be applied with the contracts under the effect of General Conditions approved in CMEA. In accordance with the commission, this questionary was reconciled early in 1979 in order to render able the countries to elaborate the national materials on the basis of the questionary. Relying thereupon, the designated delegation will compile its proposals to be generalized.

A working program was proposed for the compilation of a terminological dictionary of most important legal notions most frequently used in legal documents of CMEA. These proposals were deliberated in the 16th meeting of the Conference. The Conference decided to deliberate again this question in 1981.

The comparative study of legal norms to be applied for contracts concluded in the field of economic co-operation, as well as the study of the norms of the conflict of laws being significant with respect to the economic and scientific-technical co-operation between the member-countries of CMEA had to be commenced in 1979–1980 in accordance with the plans.

4.6. *The countries will further develop the "General conditions of the delivery of goods between the organizations of CMEA member-countries" (General Conditions of Delivery of 1968 of CMEA), "General Conditions of Erection of 1962 of CMEA" and "General Conditions of Technical Assistance (Service) of 1962 of CMEA". The countries take concrete measures for developing further the normative system defining the liability of economic organizations in case of failure or inadequate performance of the undertaken obligations* (Chapter 15, paras 5 and 6).

In 1974, the Legal Conference made proposals for the modification and completion of General Conditions of Delivery of Goods of 1968 of CMEA. The Executive Committee approved in its 69th meeting the above-mentioned proposals and the necessary modifications and completions were accordingly made. Thereby the improvement of unified legal regulation of relations in the field of sale of goods between the economic organizations, as well as the increase of liability stipulated for the failure or inadequate performance of obligations were rendered possible.[10]

[10] HONTVÁRI, M.: *Kártérítési felelősség a minőségért az Általános Áruszállítási Feltételek* körében (Liability for damages for the quality of goods in the General Conditions of Delivery), Magyar Jog, 4, 5/1972.; VIDA, S.: *A műszaki fejlesztő tevékenység eredményei és az ÁSzF* (The results of technical developing activity and the General Conditions of Delivery), Jogtudományi Közlöny, 10/1973.; SZÁSZ, I.: *A*

The Permanent Committee for Foreign Trade of CMEA dealt with the further development of the General Conditions of technical service of machines, equipment and other articles delivered by the organizations of CMEA-countries, of the General Conditions of Erection and of the General Principles of supply with spare parts of machines and equipment delivered in the trade between the member-countries of CMEA and the Yugoslav Socialist Federal Republic. The above-mentioned document was approved by the Executive Committee in 1973.

4.7. *For the sake of legal regulation of relations in connection with the foundation and activity of international economic organizations, the interested member-countries of CMEA elaborate and take the necessary measures* (Chapter 15, para 7).

In 1970–1971 a working group of the Conference dealt with these questions and elaborated the relative proposals.

The results of the study of these questions are contained in the report of the Legal Conference. In its 53th meeting, the Executive Committee approved the reconciled parts of the report which then became the basis of the elaboration and taking of necessary measures, and within it, of the elaboration of normative acts relating to the foundation and activity of International Economic Organizations.

The Conference elaborated the "Model-rules relating to the conditions of foundation and activity of international economic organizations in the member-countries of CMEA" and submitted them to the Executive Committee.

The "Model-rules" were approved in the 61th meeting of the Executive Committee. The Executive Committee took the position that the member-countries would take into consideration the "Model-rules" with the foundation of international economic organizations and with the elaboration of the suitable normative acts within the countries to the extent deemed expedient.

The deeds of foundation and other documents of the international economic associations and international companies were elaborated on the strength of the report compiled by the Conference and considering the "Model-rules".

The Legal Conference and other organs of CMEA continued the complex study of questions relating to the foundation and activity of International Economic Organizations.[11]

KGST Általános Szállítási Feltételek (General Conditions of Delivery of CMEA), Budapest, 1974, p. 419.; SZÁSZ, I.: *A KGST Általános Szállítási Feltételek felelősségi rendszerének továbbfejlesztése* (The further development of the liability system of the General Conditions of Delivery of CMEA), Jogtudományi Közlöny, 3/1976.; VOJTASEK, P.: *A KGST tagállamok szervezeteinek felelőssége az áruszállításokra és szolgáltatásokra vonatkozó külkereskedelmi szerződésekből származó kötelezettségek megszegéséért* (Liability of the organizations of CMEA-countries for the violation of obligations originating from foreign-trade contracts relating to the delivery of goods and services), Magyar Jog, 9/1977.

[11] KALENSKY, P.: *A nemzetközi gazdálkodó szervezetek jogi problémáihoz a KGST országokban* (To some legal problems of the international economic organizations in CMEA-countries), Magyar Jog, 3–4/1975.; FICZERE, L.–SÁRKÖZY, T.: *A KGST országok nemzetközi gazdálkodó szervezeteinek alapvető jogi kérdései* (Fundamental legal problems of international economic organizations of CMEA-countries), Budapest, 1978.; SÁRKÖZY, T.: *A KGST országok nemzetközi gazdálkodó szerveinek társulási jellegéről* (On the association character of international economic organizations of CMEA-countries), Jogtudományi Közlöny, 4/1977.

The Legal Conference composed the "Uniform provisions relating to the foundation and activity of international economic organizations" on the basis of the "Model-rules" and of other documents drawn up in the CMEA-organs and of proposals. The Executive Committee approved the "Uniform provisions" in its 74th meeting not as normative document but as recommendation.

Relying upon the previously compiled and in the CMEA-organs approved documents, the Legal Conference carried the model-document on the working conditions of employees of International Economic Organizations.

4.8. *The interested countries continue to study and elaborate the questions of co-operation in the field of legal protection of inventions, trademarks and designs* (Chapter 15, para 8).

The legal questions of the co-operation in the field of legal protection of inventions, trademarks and designs and, within it, the possible forms of co-operation in the field of licence and know-how trade were first studied in 1970. The established working group prepared proposals relating to the legal questioNs of inventions, designs and trademarks protected and used in the course of the specialisation of production and of the co-operation.

In 1971, the Council of leaders of Patent Offices of the CMEA member-countries has become a CMEA-organ. Since that time the dealing with the questions relating to the legal protection of inventions, trademarks and designs has been the duty of this Council. In the framework of the Legal Conference the drafting of model conditions of the formation of licence contracts relating to inventions, designs and know-how was continued.

In 1974, the Legal Conference approved the general model contracts of licence, as well as the complementary conditions of transfer of scientific-technical results not containing inventions and know-how, the model licence-contract for know-how transfer, the model licence-contract for the transfer of scientific-technical results free of charge and the model licence contract relating to trademarks, all elaborated by the working group.[12]

According to the Conference, on the basis of experiences gained in the course of the application of the model licence-contracts, it seems to be expedient to control subsequently the practical application of the documents in question and correspondingly, possible completions and modifications might be elaborated.

4.9. *The member-countries take harmonized measures for developing further the activity displayed in the framework of the foreign-trade arbitration organizations of the*

[12] VIDA, S.: *A KGST országok védjegyjoga egységesítésének néhány kérdéséről* (On some questions of the unification of trademark laws of CMEA-countries), Jogtudományi Közlöny, 12/1972.; LONTAI, E.: *KGST törekvések a licencia szerződések feltételeinek egységesítésére* (Endeavours in CMEA for the unification of the stipulations of the licence contracts), Jogtudományi Közlöny, 12/1975.; BOBROVSZKY, J.: *A tudományos-műszaki eredmények jogi védelme a szocialista gazdasági integrációban* (Legal protection of scientific-technical results in the socialist economic integration), Budapest, 1978. (Reviewed by BÉRCZI, I., Jogtudományi Közlöny, 8/1979.)

countries and, for improving the order of settlement of disputes between the economic organizations of the countries arising from the agreements and contracts (Chapter 15, para 9)

In order to study the questions contained in the above-mentioned provisions of the Complex Program and in the decisions of the Executive Committee, a special working group on arbitration was founded.

The results of the study of questions are contained in a report; this report was approved in the 5th meeting of the Legal Conference and was submitted to the Executive Committee together with the draft of the "Treaty relating to the settlement of civil law disputes resulting from the economic and scientific-technical co-operation in the course of arbitration".

The Executive Committee approved the Treaty in its 56th meeting and at its recommendation, the member-countries of CMEA signed it in May 1972 and then ratified it.[13]

"The uniform statutes of the procedure of arbitration courts active at the chambers of commerce of the member-countries of CMEA" were elaborated and, submitted by the Legal Conference, they were approved by the Executive Committee.

The Legal Conference followed with great attention the proposals made for the elaboration of uniform rules for the invalidation of decisions of arbitration courts.

4.10. *The countries promote the mutual legal consultations, the exchange of experience and information of their organs, organizations and institutions in the course of their economic and scientific-technical co-operation, they favour the introduction of the national legal norms regulating such activities of such organizations* (Chapter 15, para 10).

In the 4th meeting of the Legal Conference several measures were agreed upon concerning the mutual legal consultations, the exchange of information, materials and experiences between the foreign-trade arbitration organs of the member-countries of CMEA. The Conference decided that the delegations should take measures in order to publish extensively the decisions of arbitration courts and other information concerning the activity of foreign-trade arbitration organs.

It was agreed upon that the delegations of the member-countries hand over directly to each other upon request the texts of laws important with respect to the economic and scientific-technical co-operation of member-countries as well as the texts of other normative acts, and the delegations themselves agree upon the method thereof. In accordance with the effective agreement, the member-countries send each other every year the list of publications in which they enumerate the papers dealing

[13] RÉVAI, T.: *A KGST államok szervezetei közti jogviták elbírálásáról* (On the settlement of disputes between organizations of CMEA-countries), Jogtudományi Közlöny, 9/1970.; NÉVAI, L.–RÉVAI, T.: *A KGST tagállamok Kamarai Választott Bíróságainak hatásköréről* (On the competence of Arbitration Courts at Chambers of Commerce of member-countries of CMEA), Magyar Jog, 12/1972.; BRATUS, SZ. N.: *A választottbíráskodás és a nemzetközi gazdasági együttműködés* (Arbitration jurisdiction and international economic co-operation), Magyar Jog, 9/1973.; ÚJLAKI, L.: *Polgári eljárás a KGST tagországokban* (Civil procedure in the member-countries of CMEA) Jogtudományi Közlöny, 10/1978.

with the legal questions of economic and scientific-technical co-operation of member-countries of CMEA.

5. In addition to the drawing up of questions treated in Chapter 15 of the Complex Program, a significant part is taken in the work of Legal Conference by *the work done in the interest of the further development of normative CMEA-documents*— under the commission of the Executive Committee (Complex Program, Chapter 16, para 3). On the strength of decisions adopted in the Session of the CMEA and taking into consideration the experiences gained with the application of the given documents, the Legal Conference, with the collaboration of the CMEA Secretariat, prepared the modification of the Charter and Convention of CMEA. The Council treated in a report the improvement of the efficiency of CMEA-recommendations and summarized, similarly in a report, the results of the studies in connection with the question.

6. On the strength of the decision taken in the 78th meeting of the Executive Committee of CMEA, the Legal Conference worked up the draft of the *document on the legal status, privileges and immunity of interstate economic organizations functioning in the particular field of co-operation.* The Executive Committee of CMEA approved the draft in its 95th meeting and the agreement was signed in December 1980.

7. *Liability and guarantees, insurance and indemnity with respect to the damage caused by radiation accident taking place during the delivery of burnt out nuclear fuels.*

The Executive Committee of CMEA approved in its 83th meeting the Regulation of safe carriage of burnt out nuclear fuels originating from atomic power plants of the member-countries of CMEA and instructed the Legal Conference to elaborate and to submit to the Executive Committee the draft of the document regulating the liability and guarantees, the insurance and indemnity with respect to the radiation accident taking place during the carriage of burnt out nuclear fuels.

The preliminary draft of the above-mentioned document was finished in 1978 in the framework of the Council. The draft of the Agreement will be finished presumably in 1980–1981.

8. The Legal Conference deals with the proposals of the CMEA Secretariat directed to the further development of the activity displayed in the framework of the Legal Conference of CMEA.

The related decisions of the Conference set the most important course of the further work, the measures intending to improve the planning of the work, as well as the measures ensuring a better control of the fulfilment of the working plan and of the decisions. It determines the measures to be taken by the Conference for the acceleration of the preparation and deliberation of questions. The Conference approved the motions aiming at the modernization of its Statutes, to be submitted to the Executive Committee.

9. The survey reveals convincingly that the Legal Conference of CMEA has done wide-ranging and significant work in ten years. This work has effectively contributed to the favourable legal conditions of the co-operation of member-countries, and to the development of socialist economic integration.

Совещанию представителей стран-членов Совета Экономической Взаимопомощи по правовым вопросам — десять лет

Й. Силбереки

В вводной части статьи автор занимается значением социалистической экономической интеграции и характером Совета Экономической Взаимопомощи (в дальнейшем: СЭВ). Автор ссылается на результаты, достигнутые в общественно-экономическом развитии стран-членов СЭВ, а также на те проблемы, которые возникли в последние годы.

С точки зрения повышения эффективности сотрудничества основополагающим является исполнение принятой в 1971 году Комплексной Программы, а также осуществление разработанных с тех пор долгосрочных комплексных целевых программ сотрудничества. Все это требует надлежащего обеспечения условий организации и деятельности СЭВ. Таким образом важнейшими средствами, входящими в систему условий интеграции, являются создания правовых основ социалистической экономической интеграции, осуществление и совершенствование регулирования. Соответствующий правовой механизм может быть подходящим помощником эффективного функционирования экономической интеграции. С целью развития правового механизма СЭВ в конце 1969 года был создан постоянный орган СЭВ — Совещание стран-членов по правовым вопросам. За истекшие 10 лет Совещание — посредством его правовых средств — значительной мере содействовало организационному развитию социалистической экономической интеграции и ее функционированию. Способами развития правовых основ являются: разработка и принятие нормативных актов, регулирующих экономическое и научно-техническое сотрудничество; регулирование порядка разрешения возникающих спорных вопросов; сближение и унификация соответствующих национальных правовых норм; создание общих правовых норм. Формами этих последних являются соглашения между странами и рекомендации органов СЭВ для стран.

В разделе 15 Комплексной Программы установлены важнейшие задачи правовой работы. Автор в свете 15 раздела Комплексной Программы рассматривает деятельность Совещания по правовым вопросам с его создания.

Правовая работа в рассматриваемый период распространилась на следующие области:

— Разработка рекомендаций для координации народнохозяйственных планов и капиталовложений по отдельным объектам, представляющим взаимной интерес.

— Разработка правовых норм по вопросам сотрудничества в области международной специализации и кооперирования производства.

— Разработка правовой нормы относительно сотрудничества в области научных и технических исследований.

— Разработка принципов материальной ответственности государства.

— Принятие меры к сближению национальных правовых норм, регулирующих деятельность созданных странами-членами хозяйственных, технических и других организаций в области их экономического и научно-технического сотрудничества.

— Дальнейшее развитие общих условий поставок товаров между организациями стран-членов СЭВ (1968 г.).

— Дальнейшее совершенствование системы норм, определяющих материальную ответственность хозяйственных организаций за неисполнение или ненадлежащее исполнение обязательств.

— Разработка единообразных положений об учреждении и условиях деятельности международных хозяйственных организаций стран-членов СЭВ.

— Разработка вопросов, связанных с правовой охраной изобретений, товарных знаков и промышленных образцов, а также типовых условий лицензионного договора.

— Разработка конвенции о разрешении арбитражным путем гражданско-правовых споров, возникающих в ходе экономического сотрудничества.

— Подготовка соглашения о правовом статусе и привилегиях межгосударственных экономических организаций, функционирующих в определенных областях сотрудничества.

— Обеспечение обмена опытом и информацией по правовым вопросам.

По мнению автора статьи изучение указанной правовой работы свидетельствует о том, что десятилетняя деятельность Совещания представителей стран-членов СЭВ по правовым вопросам успешно служит обеспечению правовых условий сотрудничества между странами-членами.

Zehn Jahre alt ist die Beratung des RGW für Rechtsfragen

J. SZILBEREKY

Der einleitende Teil der Abhandlung befaßt sich mit der Bedeutung der sozialistischen Integration und dem Charakter des Rates für gegenseitige Wirtschaftshilfe (im weiteren: RGW). Es wird auf die in der gesellschaftlichen und wirtschaftlichen Entwicklung der RGW-Länder erzielten Ergebnisse und auch auf die in den letzten Jahren aufgetauchten Schwierigkeiten hingewiesen.

Aus dem Gesichtspunkt der Erhöhung der Wirksamkeit der Kooperation ist die Durchführung des im Jahre 1971 angenommenen Komplexprogramms, sowie die Realisierung der seit dieser Zeit geformten langfristigen komplexen Kooperationszielprogramme grundlegend. All das erfordert die entsprechende Sicherung der Organisations- und Funktionierungsbedingungen des RGW. Dementsprechend ist die Schaffung der rechtlichen Grundlagen der sozialistischen Wirtschaftsintegration, der Ausbau und Vervollkommnung der Regelung ein in das Bedingungssystem der Integration gehörendes wichtiges Mittel. Der entsprechende rechtliche Mechanismus kann ein fähiges Mittel der wirksamen Funktionierung der wirtschaftlichen Integration sein. Für den Ausbau des rechtlichen Mechanismus des RGW kam Ende 1969 das ständige Organ des RGW, die Beratung für Rechtsfragen zustande. Sie trug während der letzten 10 Jahre, mit ihren rechtlichen Mitteln, bedeutend zum organisatorischen Ausbau und zur Entwicklung der Funktionierung der sozialistischen wirtschaftlichen Integration bei. Die Methoden der Entwicklung der rechtlichen Grundlagen sind die folgenden: die Ausarbeitung und Annahme der die wirtschaftliche und technisch-wissenschaftliche Kooperation regelnden normativen Akte, die Regelung der Beurteilungsordnung der auftauchenden Streitfragen, die Annäherung der entsprechenden nationalen Normen, ihre Vereinheitlichung und die Schaffung allgemeiner Rechtsnormen. Die Form dieses Letzteren sind die zwischenstaatlichen Abkommen und die Empfehlungen des RGW an die Mitgliedländer.

Abschnitt 15 des Komplexprogramms bestimmt die wichtigsten Aufgaben der Rechtsarbeit. Die Abhandlung behandelt demnach die bisherige Arbeit der Rechtsberatung im System des Abschnitt 15 des Komplexprogramms.

Die bisherige Tätigkeit auf diesem Gebiet erstreckt sich auf die folgenden:

— Ausarbeitung der Empfehlung zur Abstimmung der Volkswirtschaftspläne und der Investitionen im Zusammenhang mit einzelnen Objekten von dem gemeinsamen Interesse. — Ausarbeitung von Rechtsnormen für die Kooperation auf dem Gebiet der Produktionsspezialisierung und der Kooperation. — Ausarbeitung von Rechtsnormen zur Kooperation auf dem Gebiet der wissenschaftlich-technischen Zusammenarbeit. — Die Ausarbeitung von Prinzipien bezüglich der materiellen Verantwortlichkeit der Staaten. — Verfügungen zur Näherung der durch die Mitgliedstaaten geschaffenen die kooperative Tätigkeit der Wirtschafts-, bzw. der technischen und sonstigen Organisationen berührenden nationalen Rechtsnormen. — Die Weiterentwicklung der Allgemeinen Bedingungen für Warenlieferungen (ALB/RGW 1968). — Die Weiterentwicklung des Normensystems der materiellen Verantwortlichkeit der Wirtschaftsorganisationen im Falle der Nicht- oder nicht gehörigen Erfüllung von Verpflichtungen. — Die Fertigstellung von Musterbedingungen für die Bildung und Tätigkeit der internationalen Wirtschaftsorganisationen des RGW. — Die Ausarbeitung der Fragen des Rechtschutzes von Erfindungen, Warenzeichen und Gebrauchsmustern sowie die Bestimmung der Musterbedingungen der Lizenzverträge. — Die Ausarbeitung der Konvention über die Schiedsgerichtliche Entscheidung von Zivilrechtsstreitigkeiten, die sich aus Beziehungen der wirtschaftlichen und wissenschaftlich-technischen Zusammenarbeit ergeben. — Die Fertigstellung des Abkommens bezüglich des Rechtsstatus und der Privilegien der auf bestimmtem Gebiet der Zusammenarbeit tätigen zwischenstaatlichen Wirtschaftsorganisationen. — Sicherung des rechtlichen Erfahrungs- und Informationsaustausches.

Die Abhandlung zieht die Folgerung, daß — wie es aus diesem Überschau hervorgeht — die Arbeit der Rechtsberatung des RGW in den vergangenen zehn Jahren die Sicherung der rechtlichen Bedingungen der Kooperation zwischen den Mitgliedstaaten erfolgreich förderte.

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Regulation of contractual relations and possible ways of its development in the legal system of the CMEA

I. Szász
Head of Department
Ministry of Foreign Trade, Professor of Academy of Foreign Trade (Budapest)

On the basis of a survey of the recent development of inter-company civil law relations within the legal system of co-operation between the CMEA countries, the author puts down that a manifold system of the uniform regulation of civil law relations has been established in the course of the last 25 years. Taking into account the specific features of the individual legal institutions established in the field of civil law relations, resulting from the inter-state collaboration of the member-countries, and the degrees of development of commodity-money relations, the organization of inter-company collaboration made a good progress, and these relations may be promoted efficiently, depending on the development of monetary relations of these countries.

As regards the legal arrangements laid down in conventions, recommendations, systems of dispositive legal regulations, and recommended model statutes which came into existence in various spheres of economic relations at different dates, present differences, being partly justified and partly casual, unjustified or, even, unnecessary. So, the continued development of civil law relations within the legal system of co-operation between the CMEA countries is an important task in order to ensure the development of the unified systems of norms in mutual harmony to each other, and to provide for uniform legal rules in an increasingly broader field of collaboration.

When the lines of further development are laid down, the idea of elaborating the general part of a uniform law of obligations took shape, with a view to ensure the unity of the system of norms, and this idea found several supporters in the legal literature. The problems of this course are analyzed, with the conclusion that, taking into consideration the specific features of the present and probable future development of the collaboration in question, the development of the system may be reached, instead of elaborating the general part of the law of civil obligations, by the joint application of the measures listed below.

—To survey all normative regulations with a view to secure that the achievements of the development of other normative systems should be reflected in them.

—It should be made accepted, as a rule, that the achievements of the promotion of the development of a distinct system of norms should be reflected in the other systems of norms simultaneously.

—The general conditions of building and planning should be elaborated thus to complete the regulations of the most important actual economic relations by uniform laws.

—The legal institutions which used not be regulated by the parties in international practice, e.g. conclusion of contracts, prescription, etc. should be excluded from the said regulation schemes. Similarly to the 1972 convention on arbitration, these could be subjected to a regulation comprising the entire field of economic relations.

—The various, and unified, types of obligations should be developed continuously, in accordance with practical requirements, and on the basis of the experiences obtained from the survey of the relevant rules of the member countries in the field of the law of obligations, laying emphasis upon harmonization and unification.

The effects of the efforts of the CMEA countries in respect of the unification of the law upon the law of international trade and the relations between these efforts and the universal unification of the law are examined, and the possibility of constituting a harmony is confirmed.

Finally, some problems of particular significance are dealt with, such as the requirement of an explicite regulation concerning interpretation and the applicability of the applicable law, the problem of the regulation of how state decisions as acts relieving from responsibility may be taken into consideration, and the causes of the insufficiency of sanctions for non-fulfilment.

1. The regulation of contractual relations in civil law preceded any other field of regulation within the legal system of CMEA co-operation; accordingly, this regulation and its development has maintained a decisive significance in the improvement of the legal system of economic collaboration between the CMEA countries, up to the present time.

The very first forms of collaboration between the member-countries appeared in the field of the exchange of goods in foreign trade, and they started to develop as soon as 1949, i.e. the year of the establishment of the CMEA. Under the conditions of the cold war, the socialist development of the demolished economies of the countries concerned had then no alternative indeed, i.e. the development could be imagined exclusively on the basis of a close economic co-operation of the countries on the way to build up socialism.

The countries which committed themselves to the socialist planned economy fitted their mutual foreign trade, serving the promotion of their national economy, into their national plans of the economy. This foreign trade became a reliably planned and safe source of the import of raw materials, semi-finished and finished goods, industrial and agricultural products, needed to keep in operation their economy, and permitted the establishment of export markets at the same time, required for the development of the economy, compensating thus the imports by the export of commodities produced by the national economy.

In accordance with the needs of the economy, the systems of economic management of the member-countries, and the methods of the economy-organizing activity of the state, enforcing themselves in all countries concerned, the mutual deliveries were laid down in bilateral inter-governmental agreements concluded by the member-countries. The contracting governments took the obligation in the said agreements that their enterprises will deliver the commodities listed and in volumes laid down in the so-called contingent lists. The provisions of the said agreements were not executed, however, in administrative channels from the very beginning on, but within the system of civil law relations between the respective enterprises, making use of the system of the means of contractual relations.

The obligations of the governments did not concern the actual delivery of goods and commodities; instead, they obliged themselves to enforce their organizations

appearing as the subjects of civil law, i.e. enterprises in the majority of the cases, to conclude contracts serving to realize the trading relations as provided. This means that actual deliveries got realized within a system of contractual relations, and the contracting parties figured as subjects of civil law. Nevertheless, the contractual relations referred to above showed several specific features which had to be taken into consideration for the civil law regulation of the same. In fact, the system of means of the civil law has been based on the supposition of the existence of market relations, and the full efficiency of these means appears only under market-based economic conditions. As for the relations between the enterprises of the member-states, these enterprises were subjected, however, to an obligation of contracting which was enforced through the state administration system of the individual country concerned, even if it could not be enforced through the system of civil law. Several substantial elements of contracting were thus fixed in advance, e.g. the volume or, in some cases, also the quality, of the goods to be delivered, and the price in an indirect way as well. Depending on the degree of development of the respective inter-state money relations, it had to be taken into consideration furthermore that, in case of a breach of the contract, it was not possible, in general, to make recourse to an alternative source of supply, and an efficient system of financial sanctions could not be enforced either.

The regulation of civil law relations had to be thus established with the due consideration of the specific features mentioned above. In view of this, the question presented itself whether or not was it correct to organize the relations concerned within the system of civil law and making use of the system of means of civil law. It seems, however, that it was the correct way from several points of view. Thus, the contractual relations gave an efficient frame to inter-enterprise relations from the very beginning on, corresponding to the system of links built up between the individual enterprises within the various member-countries, and they contained elements of civil law responsibility also from the initial time, even if their effects were of a limited nature. Besides, the technical structure of contracts, comprising the contractual specification of the content of liabilities gave the best possible form of the precise determination of the rights and obligations, and the organization and regulation of economic relations; doubtless to say, it was a better model than arrangements through an administrative system within the framework of public law.

At the same time, the development of economic relations, the exchange of goods and commodities, and the furthering of international monetary and financial relations constituted a basis for the promotion of the contractual model, with an increasingly richer and more widely established system of institutions, permitting to serve the proper functioning of economic relations. This development could be well witnessed over the recent period of time, covering more than thirty years, and the prospected development of technical, scientific, and economic collaboration is proceeding in the same direction.

2. The specific features of trade relations, mentioned above, justified the *compulsory unification* of the content of the contracts in the widest possible range from

the very beginning on. Under the system of compulsory contracting and taking into consideration that, within the conditions of compensated trading, the enterprises of a given country were sellers and buyers to the same extent, it would have been unjustified to allow differences e.g. in respect of responsibility, beyond the specific features of the commodities concerned. It would have been easily understandable namely that a system in which the enterprises of a given country, acting as sellers, ought to have accepted quite different conditions than in the position of a buyer, would have implied unjustified advantages or disadvantages for the totality of the enterprises concerned. Similarly, the actual economic, market, and financial relations of that time did not justify lengthy negotiations of contracting as well.

It was the situation outlined above that brought into existence the establishment of general conditions of the delivery of goods and commodities with a compulsory effect. At the beginning, these rules were laid down in bilateral systems as part of intergovernmental agreements. As a result of multilateral negotiations between the member-countries, the *General Conditions of Delivery of the CMEA* were constituted in 1958[1] (CMEA GCD of 1958). Instead of being compulsory general conditions, these rules appeared as a legal regulation, integrated into the legal systems of the member-countries, duly promulgated, and being decisive for the relations concerned. On a world-wide scale indeed, this document represented the very first step toward the constitution of a uniform law bearing upon sales in foreign trading or, as regards their field of application, even to a broader range, enforcing within a given area and with an actually broad field of practical application. It is worth mentioning that the said rules still represent a unique achievement in the actual world-wide process of the unification of law.

The General Conditions of Delivery of the CMEA from 1958 were completed by *bilateral agreements*[2] in respect of problems which were not considered by the member-countries to be regulated in multilateral frames but had a given significance, nevertheless, in the regulation of bilateral trade relations. Representing a uniform law,

[1] Published in Hungary by the Instruction No. 5/1958 (Kk. É. 4.) KKM of the Minister for Foreign Trade. For more details, cf. KEMPER, M.: *Liefervertrag, Montagevertrag, Kundendienstvertrag im Außenhandel der RGW-Staaten*, Berlin, Staatsverlag der DDR, 1967.

[2] They were improved later, parallel to the development of the General Conditions of the Delivery of Goods. For the time being, the bilateral supplementary agreements in force, concluded by Hungary, are as listed below:

— Hungarian–Czechoslovak bilateral agreement, promulgated by the Decree of the Minister for Foreign Trade No. 3/1973 (X. 18.) KKM;
— Hungarian–Cuban bilateral agreement, promulgated in Annex No. 2. of the Decree of the Minister for Foreign Trade No. 10/1975 (XII. 21.) KKM;
— Hungarian–Polish bilateral agreement, promulgated by the Decree of the Minister for Foreign Trade No. 5/1969 (VI. 29.) KKM;
— Hungarian–German (Democratic Republic) bilateral agreement, promulgated by the Decree of the Minister for Foreign Trade No. 2/1969 (II. 2.) KKM;
— Hungarian–Soviet bilateral agreement, promulgated by the Decree of the Minister for Foreign Trade No. 6/1976 (IX. 28.) KKM.

enforcing itself for international trading transactions within the given area, the General Conditions of Delivery of the CMEA from 1958 became thus the initial point for a large-scale uniform regulation of civil law relations. This process of development was substantially promoted by the Complex Programme of the CMEA[3], determining the main tendencies at the same time, and putting into the foreground the development of the legal institutions of CMEA co-operation within a uniform legal system.[4] A special emphasis has been laid in this system on the promotion of civil law relations and, within this sphere, on civil law liability and the strengthening of sanctions in case of a breach of contract. The development of the General Conditions of Delivery from 1958 resulted in the establishment of the *General Conditions of Delivery constituted in 1968.*[5] This document represented an important step of progress in building up civil law liability; besides, it contained a uniform regulation of prescription, too. This regulation was incorporated into the legal system of most of the member-countries by means of acts or at a similar high legislative level. Within the frame of development, as provided by the Complex Programme, the *General Conditions of Delivery of the CMEA from 1968/1975* were codified[6] as a result of the promotion of the system of liability, dealing with the rules of liability in the frames of an independent system. The subsequent improvement of this system presented the *1979 wording of the General Conditions of Delivery of the CMEA from 1968/1975.*[7]

3. The rules of contracting and prescription were first regulated together by the General Conditions of Delivery within the system of the international unification of the law. Earlier, the said problems were regulated, within the unification of the law of the international sale of goods, in the form of separate conventions, such as the UNIDROIT and the Hague Conference (uniform acts from 1964[8]), and the UNCITRAL (Convention on Prescription from 1974[9]). The Vienna Convention on the international sale of goods from 1980, with a step forward, gave already a complex regulation, although the possibility of separate application was left open.[10]

[3] COMPLEX PROGRAMME, destined to extend and improve subsequent collaboration and develop the socialist economic integration of the member-countries of the CMEA; Chapter 15.

[4] Cf. Сас, И.: *Правовой механизм интеграции в рамках СЭВ*, Acta Juridica, 3–4/1980.

[5] Promulgated in Hungary by Law-decree No. 35 of 1968. For more details, cf. Szász, I.: *A KGST Általános Szállítási Feltételek* (General Conditions of the Delivery of Goods of the CMEA). Budapest, Közgazdasági és Jogi Könyvkiadó, 1974. Wagner H.–Kretzschmar, D.: *Die Allgemeinen Lieferbedingungen des RGW, 1968.* Berlin, Staatsverlag der DDR, 1970.; Розенберг, М. Г.: *ОУП СЭВ 1968. Года XII.*

[6] For more details, cf. Сас, И.: *Общие условия поставок СЭВ*, Moscow, Yuritchesskaya Literatura, 1978.

[7] Promulgated in Hungary by Law-decree No. 23. of 1979.

[8] *Uniform act on the international sale of goods and uniform act on the conclusion of contracts regulating the international sale of goods.* A publication of the International Trade Law Bureau of the Hungarian Chamber of Commerce. 1972.

[9] *Convention on the Limitation Period in the International Sale of Goods.* New York, United Nations Conference on Prescription (Limitation) in the International Sale of Goods, 20 May to 14 June, 1974, Official Records (A/CONF. 63/15).

[10] *Final Act of the United Nations Conference on Contracts for the International Sale of Goods,* Article 92. United Nations General Assembly, (A/CONF. 97/18).

Rules realizing the unification of law in the field of substantive law and law of procedure as well as substantive law and conflict of law norms—as a unique system—were first laid down also in the General Conditions of Delivery.

4. The General Conditions of Delivery present a specific system of liability, taking into consideration the nature of the relations between the enterprises of the member-states.[11] Within this system, the broadest remedy for a breach of contract is granted by penalty, as a lump sum for damages, this latter being enforced depending on the development of other institutions of integration-based relations, asserting themselves in the sphere of economy. This development and its actual phase of progress are expressed in given fields by the possibilities and rules of the alternative enforcement of penalty and damages.[12]

The institution of rescission should be also mentioned, placed within the features of economic relations, with the regulation of the restriction of rescission in case of a breach of contract, appearing in the form of faulty performance.[13]

5. The range of the relations regulated by the General Conditions of Delivery increased substantially with the augmentation of the number of member-countries of the CMEA. In line with multilateral and bilateral regulation, special regulations appeared too, resulting principally from the distant geographical situation of a given member-country, in the form of multilateral regulations affecting, however, only the trade of the distinct country in question, by excluding the enforcement of specified rules, ensuring the possibility of a different regulation,[14] or containing a multilateral agreement with an explicitly different regulation.[15]

6. The legal regulation as laid down in the General Conditions of Delivery surpassed the range regulating the relations of the member-countries of the CMEA in several respects. The relations of the CMEA member-countries, on the one hand, and China, Korea, and Vietnam (not a member-country earlier), on the other hand, were established, essentially, on the basis of the General Conditions of Delivery, mainly of their 1958 form.[16]

[11] Among others, cf. Szász, I.: *A KGST Általános Szállítási Feltételek felelősségi rendszerének továbbfejlesztése* (Improvement of the liability system of the General Conditions of the Delivery of Goods of the CMEA), Jogtudományi Közlöny, 3/1976.; Hontvári, M.: *Felelősség a minőségért a nemzetközi adásvétel körében* (Liability for quality in international sale); Budapest, Közgazdasági és Jogi Könyvkiadó, 1979. Part III, Chapter 2.; Vörös, I.: *A késedelem szabályozása a KGST 1968. évi ÁSZF-ben és a választottbírósági gyakorlat* (The regulation of delay by the General Conditions of the Delivery of Goods of the CMEA from 1968 and the practice of arbitration) Jogtudományi Közlöny, 1/1969.

[12] Cf. e.g. the 1979 wording of the General Conditions of the Delivery of Goods of the CMEA from 1968/1975, paragraph 85, indent (4), and paragraph 86–A.

[13] Cf. the 1979 wording of the General Conditions of the Delivery of Goods of the CMEA from 1968/1975, paragraph 2–A, paragraph 31, indent (8), and paragraph 75, indent (7).

[14] As regards the People's Republic of Mongolia, and taking into consideration the specific features of its economic development, problems related to damages should be regulated by means of bilateral agreements. (Resolution of the Standing Committee of the CMEA from June 5, 1975, item b).

[15] Multilateral agreement between Cuba and the other member-states of the CMEA, promulgated in Annex 1. of the Decree of the Hungarian Minister for Foreign Trade No. 10/1975 (XII. 21.) KKM.

[16] *A külkereskedelem hatályos jogszabályai* (Legal rules in force in the field of foreign trade), Budapest, Közgazdasági és Jogi Könyvkiadó, 1965. pp. 319., 326., 330.

As regards the general conditions of the delivery of goods, applicable in case of the respective stipulations of the parties, elaborated jointly for the relations existing between the entreprises of the CMEA member-countries and Finland, they took as model also the system of rules and the arrangements of the General Conditions of Delivery of the CMEA countries, taking into consideration, as a matter of fact, the differences resulting from the structure of the economic relations and the specific features of the two systems of norms.[17] (Initiative steps with a view to constitute conditions of delivery of this type were taken also by other countries maintaining contractual relations with the CMEA.)

General conditions of delivery, as elaborated within the frame of the collaboration between chambers of commerce of some CMEA member-countries and the Yugoslav Chamber of Commerce, recommended for application, reflect also the enforcement of the solutions provided by the General Conditions of Delivery of the CMEA.

Several stipulations of the conventions concluded in the field of the universal unification of law, first of all in the frame of UNCITRAL, bear the effect of the General Conditions of Delivery of the CMEA. This influence is, of course, particularly apparent when earlier achievements, such as the Hague Conventions from 1964, are compared to conventions brought about with the participation of a large group of the socialist countries, e.g. UNCITRAL drafts agreements, and the Vienna Convention on the international sales of goods.

7. The General Conditions of Delivery of the CMEA have been destined to regulate only a single type of civil-law relations between the enterprises of the member-countries, i.e. sales, even if their rules should be applicable to other types of contracts to, *mutatis mutandis*, as this view was expressed by several authors.[18] In fact, the civil-law relations between the enterprises of the CMEA member-countries have a much broader basis. Accordingly, the elaboration and putting into force of uniform rules for several types of contracts of the system of the institutions of civil law may be experienced from the end of the fifties, and within the course of the implementation of the Complex Programme, in particular.

As the general rules of obligation of the civil law come from the abstraction of the rules of sales, and the particular rules of the types of contracts are taken from the differences from the same, respectively, so the uniform regulation of the economic

[17] Розенберг, М. Г.: *Общие условия поставок СЭВ-Финландия*, Vnyeshnaya Torgovlya, 6/1980.; Juhász, J.: *KGST-finn ÁFSZ* (General Conditions of the Delivery of Goods between the CMEA and Finland), Külgazdaság, 8/1979.; Heikki, J.: *Comparative Aspects of the Application of the Finland/CMEA General Conditions of Delivery of Goods;* Essays in Honour of Erik Castrén, Helsinki, Publication of the Finnish Branch of the International Law Association, 2/1979.

[18] Cf. Луниц, Л. А.: *Соотноще международного договора и внутригосударственного закона в гражданском и трудовом праве*, Utsebniye Zapiski VNIISZ, 14/1968, p. 226.; Szász, I.: op. cit. p. 184.; Bánrévy, G.: *KGST 1968. évi Általános Szállítási Feltételei* (General Conditions of the Delivery of Goods of the CMEA from 1968), Döntőbiráskodás, 5/1969.

relations under civil law are based on the regulation of the General Conditions of the Delivery of Goods within the legal system of the CMEA.

In conformity with the above-mentioned, the respective member-countries elaborated first the *General Conditions of Erection*[19] and the *General Conditions of Technical Assistance (Service)*[20], taking into consideration the General Conditions of Delivery as laid down in 1958. Subsequently, taking as basis the dispositions of the General Conditions of Delivery from 1968, bringing into harmony with the previous systems of rules, and effecting the modernization of the regulations, the *General Conditions of the technical service of machinery, equipment, and other goods and commodities delivered by organizations of the member countries of the CMEA, entitled to act in the field of foreign trade,* were put into effect on January 1, 1974 (General Conditions of Technical Assistance (Services) of the CMEA from 1973)[21], as well as the *General Conditions of the fulfilment of erection and technical services related to the delivery of machinery and equipment for and by organizations of the member-countries of the CMEA, entitled to act in the field of foreign trade* (General Conditions of Erection of the CMEA from 1973)[22]. Furthermore, the *General principles of the supply of spare parts of machinery and equipment, delivered within the mutual trade between the member countries of the CMEA and the Socialist Federative Republic of Yugoslavia* became also effective.[23]

The requirement of regulation, created by the specific features of the long-term relations arisen in the field of the specialization of production and co-operation, was met by the *General Conditions of the specialization of production and co-operation between the organizations of the member-countries of the CMEA* (General Conditions of the Specialization of Production and Co-operation)[24], which came into effect with January 1, 1980.

In connection with the broadening of the field of co-operation, the elaboration of uniform model contracts bearing upon licenses became necessary. The documents elaborated by the member-countries this frame comprised a *general model contract of license, supplementary conditions concerning the transfer of technical-scientific achievements other than inventions and know-how, a model license contract on know-how transfer, a model license contract on the transfer of technical-scientific achievements free of charge, and a model license contract on trade-marks.*

8. The member-countries concluded an international convention in 1972,[25] containing the constitution of a uniform system for the settlement of disputes

[19] *A külkereskedelem hatályos jogszabályai* (Legal rules in force in foreign trade), p. 343.
[20] *A külkereskedelem hatályos jogszabályai* (Legal rules in force in foreign trade), p. 351.
[21] Promulgated in Hungary by Law-decree No. 30. from 1973.
[22] Promulgated in Hungary by Law-decree No. 31. from 1973.
[23] Promulgated in Hungary by Decree No. 5/1973 (II. 9.) KKM of the Minister for Foreign Trade.
[24] Promulgated in Hungary by Law-decree No. 24. from 1974.
[25] Convention on the settlement by arbitration of civil-law disputes resulting from economic and scientific co-operation (Promulgated in Hungary by Law-decree No. 23. from 1973.).

concerning economic relations of enterprises, regulated or not by various uniform systems of norms.

9. The legal character of the systems of norms, destined to give a uniform regulation of civil law relations, presents a great variety. Thus, these norms may appear as

—compulsory rules based on international conventions or agreements, e.g. the convention on arbitration;

—uniform systems of rules, integrated into the legal systems of the member-countries, on the basis of CMEA recommendations, and enforced without particular stipulation, such as the General Conditions of the Delivery of Goods, the General Conditions of Erection, the General Conditions of Technical Assistance (Services);

—systems of norms integrated into the legal systems of the member-countries but enforcing only in case of particular stipulations;

—norms recommended for the parties but enforcing only in case of particular stipulations, i.e. as general conditions, etc.

Although the norms referred to above differ from each other as far as their compulsory effect is concerned and, the more, some of them cannot be even considered as elements of a legal regulation, all of them have a very definite influence on the actual practice of contracting. (As *Bauer* hinted to it, the model conditions will be considered as usage by the boards of arbitration beyond doubt, and a dispute will be settled on the basis of same, unless otherwise stipulated, as it is laid down in paragraph 12 of the uniform statutes of the boards of arbitration attached to the chambers of commerce[26]).

10. As it is clear from the precedings, uniform systems of norms and conditions, regulating the relations of economic co-operation within the framework of the CMEA, were set up on a broad scale with the development of the co-operation in question. As the question raised earlier concerned more how to develop a distinct system of norms, the actual problem concerns more and more the ways and means of the development of the complexity of distinct systems of norms regulating civil law relations, e.g. the relations of systems of norms to each other, the suitability of the present system of the unification of law (i.e. the separate unification of groups of norms coupled to a given economic relation, such as delivery, erection, services, etc.) for the promotion of the unification of civil law relations, and the regulation of a broader range of civil law relations within a uniform system.

The view has been expressed more and more frequently both in juridical practice and the literature that the harmony between the various systems of norms and the juridical settlements put down in them is not ensured satisfactorily in the actual system of development, even if, as it is the rule, the system and the settlements of regulation of

[26] BAUER, M.: *A KGST Komplex Program jogi vonatkozásai és időszerű kérdései* (Legal aspects and topical problems of the Complex Programme of the CMEA). (A report). 9th National Working Conference of the Hungarian Lawyers' Association (Publication of the Hungarian Lawyers' Association). 1979, manuscript. p. 455.

the General Conditions of the Delivery of Goods of the CMEA are considered as starting point in the unified systems of norms.

Beside the efforts serving to ensure harmony, the differences between the individual systems of norms may be attributed to several fundamental causes, reading as follows:

a) Some differences reflect the necessary differences resulting from the inner content of the given type of economic relations.

b) Another group of the differences cannot be motivated by the existence of differences of the content of economic relations. Accordingly, these result from a lack of a common fundamental regulation of systems of norms, coming into existence separately from each other but duly attached to given economic relations, on the one hand, or the failure of consideration of the application of already established rules, on the other hand.

c) Furthermore, differences arise also from the circumstance that the individual systems of norms, the General Conditions of the Delivery of Goods, in particular, but other systems as well, used to be developed from time to time, and the achievements of these efforts failed to appear in other systems of norms, due to the lack of development work in same, either at the same time or subsequently. Thus, the General Conditions of Erection or the conditions of supply and shopping services reflected the system of the rules of the 1958 General Conditions of the Delivery of Goods at the time of their establishment; later on, i.e. at the time of their improvement, effected at the beginning of the seventies, the regulation of the General Conditions of the Delivery of Goods, as laid down in 1968 was taken into consideration. As regards, however, the stipulations put down in the General Conditions of the Delivery of Goods in their 1968/1975 wording and the reshaped text of the said document in 1979, these provisions were reflected no more, for the development work effected in the second half of the seventies did not include the improvement of the General Conditions of Erection and the General Conditions of Technical Assistance (Service).

As it is clear from the above-mentioned, some differences proved to be justified but others, not few in number, are unjustified or unnecessary.

The total lack of the regulation of some types of relations by a uniform system of norms, such as building contracts[27], having a highly important place within the system of co-operation, as well as projecting contracts, atypical contracts, etc. has caused troubles as well.

As it was thus laid down, *the problems to ensure the development of the co-ordinated harmony of the unified systems of norms, on the one hand, and to settle the full range of co-operation by means of uniform legal rules, on the other hand, present themselves as important purposes of the further development work.*

[27] The Standing Committee for Foreign Trade of the CMEA set up a working group in 1973, with a view to elaborate "General Conditions for Building". After an activity of two years, the working group came to the conclusion that the elaboration of the said general conditions required further experiences.

The targets mentioned above raise then the problem whether it would be justified to integrate the general rules of the systems of norms regulating civil law relations into a single system of norms, and to improve them within this system, in other words *to elaborate, essentially, the uniform general part of the law of obligations within the framework of civil law.*

Several arguments may be mentioned to support the view to find a solution for the said task.

a) As a result of subsequent phases of development work, a regulation is coming to light, bearing upon the conclusion, the content, the fulfilment, the breach of contract and the enforcement of claims, within the scope of the General Conditions of the Delivery of Goods of the CMEA, which will be applicable, in general, not only to the legal relations within the sphere of regulation of the said General Conditions of the Delivery of Goods but to the relations regulated by the other uniform systems of norms as well.

b) A considerable part of the rules laid down in the General Conditions of the Delivery of Goods may be found in the provisions of the relevant national laws within the sphere of the rules of general character, i.e. not in respect of sales. Accordingly, these rules of the General Conditions of the Delivery of Goods are applicable within the relations of obligations of the enterprises of the member-countries of the CMEA not only to sales but to a broader range of transactions.

c) The overwhelming part of the rules already unified in the General Conditions of the Delivery of Goods in the way mentioned above is regulated, in a more or less co-ordinated way, within the sphere of the general rules of the law of obligations of the member-countries. In consequence of this, the work of the unification of the law presents a less considerable task than in the field of the universal unification of the law in which the rules to be unified show important differences of content.

d) Together with the development of economic relations, the claims for atypical contracts is increasing. The general part of a unified law of obligations may well give a solid basis to the constitution of contracts of this type.

e) As a result of the realization of the Complex Programme, settlements of this kind could be made already, i.e. in the field of the settlement of legal disputes.[28]

[28] The settlement of legal disputes by a court of arbitration, attached to the Chamber of Commerce of the defendant's country, was provided originally by paragraphs 91. and 92. of the General Conditions of the Delivery of Goods, regulating sales. Taking into consideration, however, the experience of its general applicability beyond sales transactions, the settlement of disputes arisen between the member-states in the field of civil law by arbitration, is now provided by an international agreement containing a general regulation for all civil law relations resulting from economic co-operation. As it was mentioned above, the disposition of settlement covers a broader field than that of the uniform regulation, enforcing in all systems of norms, and given for the systems of norms already made uniform, as it was applicable also to civil-law relations, resulting from economic co-operation, for which no uniform system of norms has been elaborated as yet. A settlement of the said kind, elaborated not only to relations regulated by an already uniform system of norms but covering all relations within the law of obligations, has the additional advantage, beyond those referred to above, that the achievements of the unification work of this kind comprise then types of contracts without a uniform regulation as well (e.g. building contracts).

On the basis of what was referred to above, the claim for the elaboration of the *general part of a unified law of obligations*, as the next step of the establishment of a uniform legal system, is appearing in the legal literature of the member-countries of the CMEA in an increasingly broad sphere.[29]

11. Apart from the actual attractive nature of the said trend of development, some problems arise from its reception, and these should be mentioned, too.

Several problems are settled in the general part of the law of civil obligations which have only a relatively marginal significance as far as mutual relations are concerned. Accordingly, it has no sense to make short-term efforts to find uniform solutions in respect of these problems, all the more as settlements with considerable differences may be found in the law of the member-countries.[30]

The general part of the law of obligations is integrated into the complex system of the given civil law. In view of this, the achievements of a systematic work, concerning the unification of the general part of the law of obligations may bring positive results more in the long run than with a medium-term character. Even so, these achievements may result in numerous cases more in harmonization than in unification. (For the time being, work is made with a view to give a survey of the general part of the law of obligations of the member-countries, and to reveal the possibilities of harmonization and unification, mainly in fields being of importance for the inter-relations of the enterprises of the member-countries; this work plays an important role in the long-term development of the civil law of the member-countries. Taking into account the experiences obtained so far, however, the elaboration of the general part of a uniform law of obligations within the said work cannot be expected.)

The elaboration of the general part of the law of obligations supposes to separate the constituent elements of the general part from the individual systems of norms and to include them into the general part of the law of obligations to be unified. This would mean, however, to give up one of the most considerable advantage of the General Conditions of the Delivery of Goods and other unified systems of norms, i.e. the circumstance that all unified rules relating to a given contract are integrated into a single system of norms, and in a structure conforming to that of the contracts, ensuring thus an easy survey for the contracting parties. In case of a disintegration of the said system, the contracting parties would be compelled to face the existence of several systems of norms with their mutual relations, instead of the present, and simple, structure. In addition to this, the necessity of the application of the applicable national laws would not be excluded even with the elaboration of the general part as outlined above.

[29] BAUER, M.: op. cit. p. 460.

[30] Cf. "*Comparative study of the norms of the applicable national law which are applicable to contracts subjected to the General Conditions of the Delivery of Goods, accepted by the CMEA countries. Formation of contracts and the validity of contracts.*" (Comprehensive material for the respective working team of the Legal Conference of the CMEA, prepared by a Hungarian group of experts, and compiled on the basis of papers of the member-countries. 1980. A manuscript.)

12. Thus it seems that the unification of the general part of the law of civil obligations, pronounced as the next step of development, would involve important difficulties. Taking into consideration, furthermore, the actual processes realized in the co-operation of the member-countries since the acceptance of the Complex Programme, and the development of the character of economic relations, the unification in question would not correspond to the present phase of the economic development of integration. Of course, the problems as how to proceed with a medium-term scheme or what may be recommended under the present conditions appear now. In view of these problems, the joint application of several measures seems to be necessary, such as

a) to make a survey of all normative regulations, with a view to ensure that they should reflect the achievements of the development of other normative systems;

b) to let accepted as a binding rule that the achievements of the improvement of a given system of unified norms be reflected simultaneously in the other systems of unified norms;

c) to elaborate the general conditions of building and projecting as this would complete the establishment of the unified normative regulation of the most important relations.

The independent unified normative regulation of further fields or economic relations depends, in fact, on the way of approach to the trend of the formation of the types of contracts. The alternatives are: to increase the number of the types to be formed and regulated, as this is emphasized in the jurisprudence of the German Democratic Republic in particular, and is reflected, accordingly, in the Act on International Economic Contracts *(Gesetz über internationale Wirtschaftsverträge)*, or to prefer the existence of fewer types, and to apply the combinations of same, with extending interpretation and application, etc. It should be mentioned as a characteristic fact that min. ten types of contracts are distinguished within the group of contracts aimed at the promotion of industrial development, i.e. contracts relating to research, development, consulting, engineering, the supply and installation of big industrial plants, including turn-key deliveries, deliveries including the production of goods or commodities, the transfer of technology, including license contracts, servicing and maintenance, technical assistance, leasing, joint ventures, and industrial co-operation. The relations in question are regulated, however, with the consideration of the existing types by the national legislation of the individual countries instead of being regarded as distinct types. It is only the German Democratic Republic in which typified regulations have been established, in the Act on International Economic Contracts (GIW), bearing upon economic-technical services (wirtschaftliche-technische Leistung, paragraph 82. of the said act), the installation of plants (Errichtung von Anlagen, paragraphs 88–97.), license contracts (Lizenzvertrag, paragraphs 176–186.), and service contracts (Leistung, Kundendienstvertrag, paragraphs 126–136.). The conclusion of contracts of the said types is promoted by various international organizations more by elaborating reference conditions, guiding

principles, etc. Accordingly, suggestions such as to elaborate a draft convention of contracts dealing with the installation of big industrial plants, with a view to the Vienna Convention on the international sale of goods, cannot reckon with a solid support. (It should be noted, however, that the problem of elaborating a special type of contracts bearing upon the delivery of big industrial plants and equipment within the CMEA area has been discussed by the jurisprudence of several member-countries.)

The creation of an excessive number of types within normative regulation might result in an unnecessary disintegration of the regulation system; at the same time, the typification of economic relations including remarkable characteristic features, established on a broad scale, seems to be desirable. As regards the existing relations of the member-countries of the CMEA, it should be examined whether it is necessary to increase the number of the types of contracts, taking into account the lack of the constitution of general conditions, model conditions, directives, etc. comprising the elements of more than one type, on the one hand, and whether it would be practicable to concentrate the elaboration and application of same, to the unification of atypical relations, on the other hand.

d) The legal institutions which, as it is established in international practice, used not be regulated by the parties, e.g. formation of contracts, prescription, etc., could be separated from the regulation of the types. Similarly to the 1972 convention on arbitration, these could be then regulated so as to cover the entire field of economic relations.

e) In compliance with practical requirements, and the experiences obtained from a survey of the rules of the member-countries bearing upon the law of obligations, having in view their harmonization and unification, the various unified types of rules of obligations should be then completed and improved. Having surveyed the legal rules of the member-countries, applied in their national legal systems for economic co-operation, it may be stated that some achievements of the long-term work concerning the examination of the possibilities of harmonization and unification may be well used for the continued joint development of the unified types of obligations. Beyond the co-ordination of the actual practice, the organized and continuous analysis of the contractual and arbitration cases has to get an important role in the improvement of the distinct systems of norms, as this requirement asserted itself already, to some extent, in the preparation of the 1979 wording of the General Conditions of the Delivery of Goods as put down in the 1968/1975 version.

The many-sided approach outlined in the preceding, the continued development of the unified types, the constitution of new types, the assurance of harmony between the distinct types, and the elaboration of a uniform regulation, to be decisive for the whole system of economic relations within a specified scope, present an important step on the way of the development of the legal system. As concerns the medium-term reality and the practical effect of this development work and, the more, its long-term validity, it seems that this approach corresponds better to the present development of economic co-operation and the requirement of extending the legal frames of this co-operation than the elaboration of the general part of a unified law of obligations.

The problem of the effect of the universal unification of the law on the future course of development presents itself when the ways of the future development proper are determined. The Vienna Convention on the International Sale of Goods was signed on April 10, 1980. Most of the countries applying the General Conditions of the Delivery of Goods participated in the preparation and elaboration of the convention. Hungary is a signatory to it, and its ratification by a considerable number of the CMEA member-countries is expected. The elaboration of other conventions, susceptible of obtaining a universal acceptance, is also provided, even if on the long run. Anyhow, the question arises whether the universal unification of the law makes it unnecessary to set up a uniform regional regulation in given fields or, in other words, the constitution of the rules in question is equivalent to a deviation from the course of the universal unification of the law.

The Vienna Convention on the International Sale of Goods offers a suitable model for the required replies. The solutions elaborated in the framework of the socialist unification of law are reflected in the convention in several points. At the same time, the priority of other international agreements, such as the General Conditions of the Delivery of Goods of the CMEA, are explicitly acknowledged (Article 90.). Anyhow, this acknowledgement raises again the problem of the legal nature of recommendation as established within the decision-making system of the CMEA, for the exception referred to above is applicable to international agreements[31]. Beyond the said stipulation, the Vienna Convention provides that two or more contracting parties, applying a similar or identical legal regulation to matters regulated by the Convention, may declare the Vienna Convention not to be applicable provided that they have their site in their country of residence. Furthermore, a signatory party to the Convention may make the same declaration in respect of its relations with a non-signatory party (Article 94).

In view of the afore-mentioned, the enforcement of the unification of the law within the CMEA, reflecting the specific features of economic co-operation realizing in the area, continues to have an important role. At the same time, it seems to be an important task to take into consideration the achievements of the universal unification of the law in the course of the improvement of regulation, and to look for solutions being in harmony with same and reflecting the specific features.

As a matter of fact, the problem of the national law, to be applicable beside the uniform system of legal norms of the member-countries in case of an accession to the Vienna Convention, will present itself. Regarding the mutual relations of the member-countries to each other, the Vienna Convention cannot be considered as secondary applicable law in case of a reference to the Article 94. mentioned above, as this would exclude the application of the Convention proper. Nevertheless, in case of a reference

[31] Recommendations are to be regarded as international agreements of this kind. Cf. Szász, I.: *A KGST Általános Szállítási Feltételek*. IX. Az ÁSZF mint nemzetközi szerződés (General Conditions of the Delivery of Goods of the CMEA. IX.—The General Conditions of the Delivery of Goods as an international agreement). p. 151.

only to Article 90., the application of the Convention as a secondary applicable law could be taken into consideration, as the disposition laid down in Article 90. does not exclude the application of the Convention as a whole; it stipulates only that the Convention is not applicable to a problem which is regulated by an international agreement. In fact, the application of the secondary applicable law is usual, with the existence of unified systems of norms, just in fields not regulated by an international agreement.

According to a provision laid down in Article 95. of the Convention, a party is allowed to make a declaration, when adhering to the Convention, to apply the Convention only in respect of the signatory countries, and not to apply it in case that its national law should be applicable according to the rules of private international law. Accordingly, a country having made the declaration referred to above ought to apply its national law in respect of a CMEA member-country which was not signatory to the Convention; on the contrary, a country not having made the declaration concerned, ought to apply the Convention, unless its application was excluded with reference to its Article 94. In view of the afore-mentioned, it seems to be reasonable for the member-countries of the CMEA to adhere to the Convention with reference to indents (1) and (2) of its Article 94, as this way ensures to maintain the present relationship between the uniform systems of normative rules and the national legal systems.

(It should be noted that the application of the Vienna Convention as national law in the mutual relations of the CMEA countries to each other would not bring about an important effect on the unification of the law, as the stipulations of the Convention concern mostly problems also settled by the systems of norms of the CMEA; at the same time, the judicial practice would become more complicated for, in cases not regulated also by the Convention, this latter ought to be interposed and consulted, prior to make recourse eventually to the respective national law.)

14. There are several problems, of practical importance, which ought to be settled in the course of the continued development of the unified types. Three of them should be dealt with below, just to give examples.

a) *Explicite regulation concerning interpretation and the applicability of the applicable national law.* In respect of the application of the uniform systems of norms, it has been an almost permanent problem the explicite rule of interpretation of the uniform systems of norms and, furthermore, the possibility of application of Article 110. of the General Conditions of the Delivery of Goods, and the extent to which normative regulation may, and must, be completed by means of interpretation. Evidently, the said application could be facilitated considerably with an explicite regulation within the course of the development of the systems of normative rules. The existing, and varying, views of jurisprudence are not completed by relevant normative rules so far.[32]

[32] Eörsi, Gy.: *Megjegyzések az ÁSZF 110. §-nak alkalmazási köréről* (Comments to the field of application of Art. 110. of the General Conditions of the Delivery of Goods). Contract problems in the trade of goods between the CMEA countries. Közgazdasági és Jogi Könyvkiadó (to be published).

The problem in question presents itself not only in respect of the unification of law within the CMEA area. Thus, the Vienna Convention stipulates in this respect that, as far as interpretation is concerned, the international character of the convention, the requirement of uniform application, and the demand of benevolence in international trade should be taken into consideration (Article 9, paragraph (1)). From the point of view of a CMEA regulation, the two first elements mentioned above are highly remarkable, for the requirement of uniform application and the promotion of unification appear as important points for the application of the systems of norms in question.

As regards the problems excluded from the explicite regulation, the first step cannot be to make recourse to the applicable national law according to the stipulations of the Vienna Convention; instead, reference should be made first to the fundamental principles on which the Convention is based; the actual problem should be settled on the basis of the said principles, and the application of the applicable national law is only admitted in the absence of satisfactory rules (Article 7, paragraph (2)). As a matter of fact, the problem raises as to where may be found the fundamental principles in question and, in case of the Vienna Convention, it will not be an easy task to find them. As regards co-operation within the CMEA area, however, the fundamental principles of co-operation are laid down in several documents. On the other hand, it is again not an easy task to reveal and determine them from a juridical point of view, to form a uniform judgment and to set up a system from them. At the same time, indirect references to the fundamental principle of co-operation appear in the jurisprudence and judicial practice even now. (So, the Court of Arbitration attached to the Chamber of Commerce of the German Democratic Republic, proceeding in the case No. 72/76, refused to adjudge a penalty of 20 pc, stipulated in the respective contract, arguing that "the requirement of the unification of the law meant the requirement of strengthening a tendency favouring to restrict the right of disposition of the parties". In other words, the refusal of the enforcement of a penalty higher than 8 pc, explicitely admitted by the General Conditions of the Delivery of Goods and stipulated by the parties was based on a fundamental principle of co-operation to which reference was made by the court.)

Evidently, the normative statements of interpretation rules and the fundamental principles should have a major role in the elaboration of a uniform legal system than they have now, as their tasks and possibilities are on a much broader scale than in the Vienna Convention.

b) The precise definition of a *state measure as a fact relieving from liability* continues to be an important problem, even if only the broad range of practice and theoretical approach are considered, as they present themselves.[33]

c) In respect of the legal regulation, there is a frequently mentioned claim, resulting from the circumstance that, although the big majority of the contracts is

[33] For more details, cf. Szász, I.: *A KGST Általános Szállítási Feltételek felelősségi rendszerének továbbfejlesztése.* (Improvement of the liability system of the General Conditions of the Delivery of Goods of the CMEA), Jogtudományi Közlöny, 3/1976.

fulfilled, the law failed so far to elaborate efficient methods for the case of non-fulfilment within the system of co-operation. The more, it has to be taken into consideration here that, as far as cases of non-fulfilment appear, the interests of the contracting parties, or countries, respectively, are affected to a fundamental extent. The sanction of penalty proved to be an insufficient way, or incentive, for the protection of the economic interests of the party claiming for fulfilment. Within the system of civil law liability, purchase to cover and the complex effect of the menace of damages or the loss of further deals may lead to appropriate results in such cases; nevertheless, the institutions of the civil law failed to obtain substantially satisfactory effects in the inter-relations of the enterprises of the member-countries so far, on account of the limits of the enforcement presented by the existing economic conditions. The restriction of the enforcement of the cases of *vis maior* by positive legal rules, e.g. the regulation of the *vis maior* effect of the afore-mentioned state measures, in particular, the limitation of the possibility of rescission of the obligor in case of *vis maior*, and the protection of the interests of the claimant against the obligor, not being in a position affected by *vis maior* by means of a penalty higher than 8 pc, e.g. fixing a delayed date of fulfilment with a supplementary penalty by the relevant court of arbitration, may give directives, to be taken into consideration in the course of future development, as long as the real effects of rescission purchase to cover and damages will enforce themselves.

Summing up the preceding, it is clear that the member-countries of the CMEA succeeded in achieving very substantial results, under specific conditions, in respect of the uniform civil law regulation of their mutual relations arising out of economic problems. At the same time, the achievements in question represent starting points for the solution of subsequent tasks and the improvement of the system.

Регулирование гражданско-правовых договорных связей и возможные направления развития в правовой системе СЭВ

И. Сас

Рассматривая развитие гражданско-правовых связей, между предприятиями достигнутое до сих пор в правовой системе сотрудничества в рамках СЭВ, автор устанавливает, что за истекшие 25 лет сложилась многоцветная система единого регулирования гражданско-правовых связей. Хотя некоторые правовые институты гражданско-правовых связей характеризуются специальностями, вытекающими из государственного сотрудничества стран-членов и развития товарно-денежных отношений, они хорошо организуют сотрудничество между предприятиями и можно их развивать дальше в зависимости от валютных отношений между странами-членами и развития товарно-денежных отношений.

Те формы правового решения, которые можно найти в конвенциях, рекомендациях, системах диспозитивных правовых норм и рекомендованных типовых положениях, заключенных разновременно в ряде областей жизненных условий и экономических связей, проявляют различия, являющиеся отчасти обоснованными, отчасти необоснованными или же ненужными. Важными

задачами дальнейшего развития гражданско-правовой системы сотрудничества в рамках СЭВ являются обеспечение гармонического согласия унифицированных систем норм, созвучного друг с другом их развития, а также регулирование едиными правовыми нормами все более широких областей сотрудничества.

При определении направлений дальнейшего развития в интересах обеспечения единства системы норм возникает мысль о разработке общей части единого обязательственного права, которую многие представляют в юридической литературе. Автор анализирует проблемы этого пути и приходит к выводу, что имея в виду особенности настоящего и ожидаемого развития сотрудничества развитие системы доступно не разработкой общей части гражданско-правовых обязательств, а совместным применением нижеследующих мероприятий:

Необходимо было бы рассматривать все нормативные регулирования с такой точки зрения, чтобы они отражали результаты развития других нормативных систем.

Следовало бы принимать как правило, что результаты дальнейшего развития отдельных систем норм одновременно должны быть отражены в других системах норм.

Нужно было бы разработать общие условия строительства и проектирова..ия, ведь этим возникает нормативное регулирование важнейших отношений.

Те институты права (но только те), регулирование которых в международной практике осуществлено не сторонами, можно выделить из регулирования типов (заключение договора, давность, и т. п.) и регулировать их — подобно конвенции 1972 года об арбитражных судах — применительно к экономическим отношениям в целом.

Отдельные унифицированные типы обязательств необходимо развивать дальше в соответствии с требованиями практики и на основе результатов рассмотрения обязательственно-правовых норм стран-членов, осуществляемого в интересах их гармонизации и унификации.

Автор изучает стремления СЭВ к унификации права, соотношение их влияния на право международной торговли и на куплю-продажу с универсальной унификацией права, и констатирует возможность согласия.

Наконец автор занимается некоторыми подчеркнутыми вопросами; требованиями регулирования, относящегося к применимости субсидиарного права; требованиями регулирования учета государственной меры как факта, освобождающего от ответственности, а также причинами недостаточности санкций за неисполнение.

Die Regelung der Zivilrechtlichen vertraglichen Beziehungen und die möglichen Richtungen der Entwicklung im Rechtssystem des RGW

I. Szász

In der Überschau der bisherigen Entwicklung der zivilrechtlichen Beziehungen zwischen den Unternehmen im Rechtssystem der RGW-Kooperation stellt die Abhandlung fest, daß sich in den vergangenen 25 Jahren ein buntes System der einheitlichen Regelung der zivilrechtlichen Beziehungen herausgebildet hat. Zwar tragen einzelne Rechtsinstitutionen der zivilrechtlichen Beziehungen Sonderheiten, die sich aus der staatlichen Kooperation der Mitgliedländer, sowie aus der Entwickeltheit der Waren- und Geldverhältnisse ergebende, aber die Organisierung der Kooperation zwischen den Unternehmen ist gut, und die Währungsbeziehungen zwischen den Mitgliedstaaten, in Abhängigkeit von der Entwicklung der Waren- und Geldverhältnisse, können gut weiterentwickelt werden.

Die Lebensverhältnisse, die in den auf zahlreichen Gebieten der Wirtschaftsbeziehungen zu verschiedenen Zeiten entstandenen Konventionen, Empfehlungen, in den dispositiven rechtlichen Regelungssystemen empfohlenen Musterbedingungen anzutreffenden rechtlichen Lösungen weisen teilweise begründete, teilweise aber eventuell unbegründete oder gar unnötige Abweichungen auf. Die Sicherstellung des harmonischen Zusammenklanges der vereinheitlichten Normensysteme, ihre

abgestimmte Entwicklung, sowie die einheitliche rechtliche Regelung weiterer Gebiete der Kooperation auf je breiterer Basis bildet eine wichtige Aufgabe der Weiterentwicklung des zivilrechtlichen Systems der RGW Kooperation.

Bei der Festlegung des Trends Weiterentwicklung taucht der Gedanke der Ausarbeitung eines einheitlichen allgemeinen Teils des Schuldrechts auf; dieser Gedanke ist in der Rechtsliteratur vielfach vertreten. Der Beitrag analysiert die Probleme dieses Verfahrens und gelangt zur Konklusion, daß in Anbetracht der Eigenheiten der gegenwärtigen und zu erwartenden Entwicklung der Kooperation, die Entwicklung des Systems nicht durch Ausarbeitung des allgemeinen schuldrechtlichen Teils des Zivilrechts, sondern durch gemeinsame Anwendung der folgenden Verfügungen erreicht werden kann.

Es sollten sämtliche normative Regelungen aus dem gesichtspunkt durchgesehen werden, ob sie die Ergebnisse der Entwicklung anderer normativen Systeme spiegeln.

Es sollte als Regel gelten, daß die Ergebnisse der Weiterentwicklung der einzelnen Normensysteme in den anderen Normensystemen gespiegelt werden.

Es sollten die allgemeinen Bedingungen des Baus und der Planung ausgearbeitet werden, da dadurch die normative Regelung der wesentlichsten Beziehungen zustande kommt.

Jene Rechtsinstitutionen, die auch in der internationalen Praxis nicht durch die Partner geregelt werden, (aber nur diese), könnten von der typischen Regelung ausgeschlossen werden (Vertragsschluß, Verjährung usw.). Diese könnten, ähnlich der Arbitragegerichtskonvention vom Jahre 1972, für die Gesamtheit der Beziehungen geregelt werden.

Die einzelnen vereinheitlichten Schuldrechtstypen sollten den praktischen Anforderungen entsprechend, — und aufgrund der zwecks Harmonisierung und Vereinheitlichung überprüften schuldrechtlichen Normen der Mitgliedstaaten — weiterentwickelt werden.

Die Abhandlung untersucht das Verhältnis der Rechtsvereinheitlichungsbestrebungen des RGW im Vergleich zur universalen Rechtsvereinheitlichung in bezug auf das Recht des internationalen Handels und des Kaufs, und stellt fest, daß eine Harmonisierung möglich sei.

Schließlich befaßt sich die Abhandlung mit einigen hervorgehobenen Fragen, sowie die Anforderung einer ausdrücklichen Regelung bezüglich der Deutung und der Anwendungsmöglichkeit des Hinterlandrechts, die Regelung dessen, daß die staatlichen Verfügungen, als Verantwortung aufhebende Akte berücksichtigt werden, und spricht über die Gründe des ungenügenden Wesens der Sanktionen im Falle einer Nichterfüllung.

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Das internationale Institutionssystem der RGW-Integration

L. FICZERE
Hauptabteilungsleiter
Sekretariat des Ministerrates

Die Abhandlung untersucht einzelne Organisations- und Rechtsbeziehungen des internationalen Institutionssystems der RGW-Integration. Sie geht davon aus, daß bei der Untersuchung des Institutionssystems der Integration in Betracht gezogen werden muß, daß sich die Integration sowohl auf Staats- als auch auf Unternehmenebene realisiert, und der Staat nicht bloß als Souverän, sondern auch als Eigentümer am Integrationsvorgang teilnimmt.

Der erste Teil der Abhandlung befaßt sich mit den Entwicklungstendenzen und dem Begriffsbereich des internationalen Institutionssystems der RGW-Integration. Es wird unterstrichen, daß in der Entwicklung des Institutionssystems der Integration *zwei* Tendenzen herrschen, und zwar der Wachstum des Institutionssystems in quantitativem Sinn, der Vorgang ihrer inneren Differenzierung, beziehungsweise die Sicherstellung der wirksamen Funktionierung des bereits zustande gebrachten Systems, der inneren Integriertheit der differenzierten Organisationsstruktur. Bei der Untersuchung des Begriffsbereichs des Institutionssystems gelangt er zur Folgerung, daß von dem Begriff des Institutionssystems in einem *engeren*, bzw. *weiteren* Sinn gesprochen werden kann. In engerem Sinn umfaßt das internationale Institutionssystem bloß die zwischenstaatlichen (bilateralen und multilateralen) Organisationen, in weiterem Sinn aber umfaßt es auch die gemeinsamen Organisationen auf Unternehmenebene (institutionelle Organisationen).

Der zweite Teil der Abhandlung überblickt die rechtlichen Mittel des *inneren Beziehungssystems* des internationalen Institutionsmechanismus, und innerhalb dessen die Beziehungen zwischen dem RGW, als zentrales Basisorgan des Institutionssystems der Integration und den *auf einzelnen Gebieten der Kooperation funktionierenden zwischenstaatlichen* Organisationen, ferner die Beziehungen des RGW und der *internationalen Wirtschaftsorganisationen* (internationale Assoziationen, gemeinsame Unternehmen zueinander in ihrer Funktionierung, die Mittel und die Methode der Koordinierung ihrer Tätigkeit. Er kommt zum Ergebnis, daß die einheitliche Richtung des internationalen Institutionssystems letzten Endes durch das gemeinsam aufgestellte Zielsystem der Integration bestimmt wird, das im langfristigen Programm der Kooperation zum Ausdruck kommt. Gleichzeitig aber funktionieren die einzelnen Kooperationsorganisationen innerhalb des Institutionssystems, im Bereich der in den Gründungsurkunden bestimmten Aufgaben, *selbständig*. Das schließt die entsprechende Koordinierung der Funktionierung der gemeinsamen Organisationen durchaus nichts aus, gerade im Gegenteil, es ist sogar eine Voraussetzung, was auch durch organisationsrechtliche Mittel (Kooperationsprotokolle) gesichert sind.

Der dritte Teil der Abhandlung untersucht die Funktionierung des Institutionssystems aus dem Gesichtspunkt der *Entscheidungsberechtigung des RGW*. Sie befaßt sich mit den rechtlichen Merkmalen und den unterscheidenden Eigenheiten des RGW-*Beschlusses*, der RGW-*Empfehlung*, des *abgestimmten Vorschlags* und der *unmittelbaren Vereinbarung*. Er schenkt der Untersuchung des Verhältnisses der RGW-Empfehlung und der internationalen Abkommen besondere Aufmerksamkeit und gelangt zur Folgerung, daß die RGW-Empfehlung ein selbständiger, spezieller rechtlicher Akt ist, die im Vergleich zum internationalen Vertrag zahlreiche spezifische Züge aufweist. Schließlich überblickt er die inhaltlichen Elemente des materiellen Wirkungskreises der einzelnen RGW-Organe.

Eine Grundlegende Bedingung der Weiterentwicklung, der Steigerung der Wirksamkeit der RGW-Integration ist die Sicherstellung der die Ausbreitung und Vertiefung der Integrationsvorgänge unterstützenden rechtlichen und institutionellen Rahmen. Das hängt vor allem damit zusammen, daß der organisatorische und rechtliche Mechanismus der Integration, ihr Institutionssystem nicht bloß ein einfacher Vermittler des wirtschaftlichen Inhalts der Kooperation ist, sondern es vermag mit seinen eigenartigen Mitteln und Methoden darauf eine Rückwirkung auszuüben, es kann die Entfaltung und Entwicklung der Integrationsvorgänge zwischen den Mitgliedstaaten fördern, oder gegebenenfalls verlangsamen oder verhindern. Daraus ergibt sich, daß die Untersuchung des Begriffsbereiches, der Struktur und der Funktionierung des internationalen Institutionssystems der RGW-Integration zur Klärung der Rolle, der Möglichkeiten und gleichzeitig auch der Schranken seiner Leistungen beizutragen vermag.

Das internationale Institutionssystem der RGW-Integration hat sowohl strukturell, als auch funktionell mehrere Aspekte, sie ist eine komplexe Erscheinung, deshalb kann es aus organisatorischem, volkswirtschaftlichem, soziologischem, rechtlichem usw. Gesichtspunkt untersucht werden. Innerhalb dieser Rahmen möchten wir die Aufmerksamkeit auf einige grundlegend rechtliche Fragen im Zusammenhang mit den Entwicklungstendenzen und des Begriffsbereiches, mit dem inneren Verbindungssystem, sowie mit der Entscheidungsordnung des internationalen Institutionssystems der RGW-Integration lenken. Es soll voran gehen, daß auch bei der Untersuchung der Struktur und der Funktionierung des Institutionssystems der RGW-Integration von den Prinzipien ausgegangen werden muß, aufgrund welcher sich die Kooperation zwischen den Mitgliedstaaten realisiert. Diese durch die Grundurkunde des RGW niedergelegten Prinzipien sind die folgenden: die Staatssouverenität, die Unabhängigkeit und Beachtung der nationalen Interessen, die Nichteinmischung in innere Angelegenheiten, die volle Gleichberechtigung, die wechselseitigen Vorteile und wechselseitige Hilfsleistung.[1] Es soll hier jene Verfügung des Komplexprogramms separat hervorgehoben werden, daß die sozialistische Wirtschaftsintegration völlig freiwillig zustande kommt und nicht mit der Errichtung übernationaler Organisationen einhergeht, sie berührt in keiner Weise die Fragen der inneren Planung und Wirtschaftung der Organisationen.[2]

Bei der Untersuchung des internationalen Institutionssystem der Integration muß ferner folgendes beachtet werden:

— die Integration verwirklicht sich sowohl auf *makro* Ebene — Kooperation der Volkswirtschaften, der Staaten —, als auch auf *mikro* Ebene — Kooperation der Wirtschaftsorgane, der Unternehmen —, ein Umstand dem bei der Beschreibung, vor allem bei der Bestimmung der Kategorie des Institutionssystems, Rechnung getragen werden muß;

[1] Siehe *Grunddokument des RGW*. Art. I, Punkt 2.
[2] Siehe *Komplexprogramm*. Kap. I, Punkt 2.

— im Vorgang der Integration sind die Staaten nicht bloß als *Souverän*, sondern auch als *Eigentümer* vorhanden, was hauptsächlich auf die Struktur und Funktionierung des Institutionssystems Einfluß ausübt;

— das internationale Institutionssystem verknüpft sich eng mit den nationalen Lenkungssystemen, (die in den internationalen Systemen getroffenen Entscheidungen realisieren sich, wenigstens bezüglich der zwischenstaatlichen Institutionen, übernationale Lenkungssysteme), es kann sich von diesen in wesentlicher Form nicht unterscheiden, wenn auch aus juristischem Gesichtspunkt zweifellos von einer anderen Qualität die Rede ist.

Die Betonung der erwähnten Prinzipien ist schon aus dem Grund wesentlich, weil sie einerseits für die Funktionierung der in das Institutionssystem gehörenden einzelnen gemeinsamen Organisationen, vor allem für ihre Entscheidungsordnung bestimmend sind, andererseits aber bringen sie die inneren immanenten Eigenheiten des internationalen Institutionssystems der RGW-Integration verglichen mit Institutionsmechanismen anderer Integrationsgruppen zum Ausdruck.[3] Dieses letztere gilt auch dann, wenn die erwähnten Prinzipien im Funktionsmechanismus der in die RGW-Integration gehörenden verschiedenen gemeinsamen, z. B. zwischenstaatlichen und zwischenbetrieblichen Organisationen die erwähnten Prinzipien aus der unterschiedlichen Natur dieser Organisationen selbstredend in abweichender Form und in abweichendem Maß zur Geltung kommen.

I

Das heutige internationale Institutionssystem der sozialistischen Wirtschaftsintegration entstand schrittweise parallel mit der Entwicklung der wirtschaftlichen und wissenschaftlich-technischen Zusammenarbeit. Ohne die Entstehung und Entwicklung des Institutions- und Organisationssystem oder einige größere Stationen dieses Vorgangs charakterisieren zu wollen, wollen wir hier bloß auf die bisherige Entwicklung und die Aufgaben der Weiterentwicklung des Institutionssystems fühlbar machende Doppeltendenz hinweisen.

Die *eine Tendenz* der Entwicklung kann im Grunde genommen als Vorgang des sozusagen *quantitativen* Wachstums, als Verlauf der *inneren Differenzierung* aufgefaßt werden. Das Wesen dieses Vorgangs ist, daß die Ausdehnung der Kooperation auf immer größere Gebiete der Wirtschaft, der Wissenschaft, der technischen Entwicklung usw. auch im Institutionssystem die Gründung von immer neueren Organisationseinheiten, gemeinsamen Institutionen zur Folge hatte. Diese Entwicklungstendenz war grundlegend und in erster Linie für die ersten zwei Jahrzehnte nach der Gründung des RGW charakteristisch, aber auch in dieser Zeit kam es natürlich nicht mit

[3] Cf. Valki, L.: *A KGST döntéshozatali problémái* (Probleme der Fällung von Entscheidungen des RGW), Jogtudományi Közlöny, 4/1973.

ausschließendem Charakter zur Geltung. Zur Illustrierung dieser Entwicklungstendenz können wir als Beispiel auf die Differenzierung der inneren Organisation des RGW in der zweiten Hälfte der 50er und ersten Hälfte der 60er Jahre (Aufstellung von zweiglichen, später dann funktionellen ständigen Kommissionen), beziehungsweise — von den 60-er Jahren — auf die Gründung von selbständigen, an gewissen konkreten Gebieten der Kooperation tätigen zwischenstaatlichen Organisationen *außerhalb* des RGW, (z. B. Intermetall, Interchim, OPW, usw.), ferner auf die Gründung bilateraler gemeinsamer Unternehmen (z. B. Haldex) hinweisen. Nach der Annahme des Komplexprogramms begann der Ausbau der gemeinsamen Unternehmen auch auf multilateraler Basis, bezüglich dieser sind aber die Möglichkeiten heute bei weitem noch nicht ausgenützt.[4] Wir können also sagen, daß als Resultat dieser Entwicklungstendenz ein verhältnismäßig kompliziertes und innerlich differenziertes Institutionssystem der Kooperation zustandegekommen ist, in welchem von den interregierungsorganisationen (RGW) bis zu den gemeinsamen Unternehmen (z. B. Interlichter) dem Charakter nach völlig verschiedene gemeinsame Institutionen anzutreffen sind. Es soll aber bemerkt werden, daß einer derartigen quantitativen (horizontalen) Zunahme des Institutionssystems aus wirtschaftlichem Gesichtspunkt gewisse begründete und sinngemäße Schranken gestellt sind, das heißt die Gründung neuer Einheiten kann keineswegs zum Selbstzweck werden. Daraus ergibt sich, daß im Rahmen des Institutionssystems die Gründung aller neuen gemeinsamen Organisationen gründlich erwogen werden soll. Allgemein könnte man sagen, daß die Gründung einer neuen gemeinsamen Organisation dann begründet ist, wenn die Arbeitsteilung auf dem gegebenen Feld bereits ein bestimmtes Entwicklungsniveau erreicht hat und die Gründung der neuen Institution tatsächlich remunerativ erscheint, beziehungsweise wenn die zu lösende Kooperationsaufgabe im Rahmen der bereits existenten gemeinsamen Institutionen nicht gelöst werden kann.

Infolge der erwähnten Differenzierung und Kompliziertheit des internationalen Institutionsmechanismus der RGW-Integration gelangte, besonders in den letzten Jahren eine *andere Entwicklungstendenz* in den Vordergrund, dessen Wesen in der *inhaltlichen Entwicklung* der bereits bestehenden Institutionsrahmen, in der Vertiefung der Wirksamkeit ihrer Tätigkeit und ihrer Arbeitsmethoden, kurz also in der Verbesserung der *Qualität* der Arbeit besteht. Diese allgemeingefaßte Anforderung soll nicht nur gegenüber *einzelnen* dem Institutionssystem angehörenden Organisationseinheiten Geltung erlangen, sondern auch gegenüber der Gesamtheit des Institutionssystems. Dieser letztere Umstand macht die Überholung des bis zu einem gewissen Grad atomisierten, verhältnismäßig stark differenzierten Institutionssystems, *die Steigerung seiner inneren Integriertheit* begründet;[5] auf die organisatorisch-rechtlichen Mittel kommen wir später zu sprechen.

[4] Siehe mehr FICZERE, L.—SÁRKÖZY, T.: *A KGST-országok nemzetközi gazdálkodó szervezeteinek alapvető jogi kérdései.* (Die grundlegenden rechtlichen Fragen der internationalen Wirtschaftsorganisationen der RGW-Länder), Közgazdasági és Jogi Könyvkiadó, Budapest, 1978.

[5] ШИРЯЕВ, Ю.: *Экономический механизм социалистической интеграции.* Moskau, 1973. p. 120 et seq.

Es taucht die Frage auf: wie kann die *Kategorie* des internationalen Institutionssystems der RGW-Integration umschrieben werden?

In der Literatur sind mehrere Standpunkte bezüglich des allgemeinen Begriffs und der Bestandteile des Mechanismus der Integration bekannt.[6] Unter Betonung der Unterschieden zwischen den Standpunkten können als gemeinsame Züge gelten, daß als Hauptbestandteile des Mechanismus der Integration im allgemeinen folgende gelten: a) die Formen der Planungskooperation, b) die volkswirtschaftlichen Mittel der Realisierung der Integration (Ware, Geldwesen), und c) organisatorische und rechtliche Formen und Institutionen.[7] Im Zusammenhang damit vertreten einige Autoren auch den Standpunkt, daß der internationale Mechanismus der Kooperation auch einzelne mit den Außenhandelsbeziehungen des gegebenen Landes zusammenhängende innere Planungs- und Regelungselemente in sich faßt.[8]

In dieser allgemeinen Auffassung ist das Institutionssystem ein Teil des Mechanismus der Integration, ein verhältnismäßig differenziertes mit anderen Elementen aber in engem Verhältnis stehendes, mit diesen sogar gewissermaßen eine Einheit bildendes Element desselben. In diesem Zusammenhang faßt ferner das Institutionssystem sowohl das rechtliche, innerhalb dessen besonders das internationale Vertragsrechtssystem, als auch das institutionelle System in engerem Sinne in sich, — wie es übrigens auch wir im Rahmen dieser Abhandlung anwenden.[9]

Im Zusammenhang mit der Struktur des Institutionssystems der Integration in obigem Sinne kann festgehalten werden, daß diesem System *verschiedene* gemeinsame Organisationen und Institutionen angehören. Bezüglich der *Gruppierung* der in das Institutionssystem gehörenden gemeinsamen Organisationen entstanden in der Literatur mehrere Standpunkte.[10] Ohne Anspruch der Vollständigkeit können wir darauf hinweisen, daß die gemeinsamen Institutionen gemäß folgenden zwei Merkmale klassifiziert werden: a) die Mitgliederschaft, b) der Charakter der Tätigkeit. Diese Merkmale müssen — obzwar sie die Institutionen von verschiedenen Seiten charakterisieren — in ihren wechselseitigen Zusammenhang und wechselseitiger Beziehung zueinander ins Auge gefaßt werden.

Aufgrund der *Mitgliederschaft* gibt es die zwischenstaatlichen Organisationen, das heißt jene Organisationen, wo die Mitglieder — im Wege der zuständigen staatlichen Organe — die Staaten selbst sind, bzw. die Zwischenbetriebsorganisationen (Organisationen von Anstalten), wo die Mitglieder die Unternehmen (Anstalten) sind. Die Bedeutung der Differenzierung aufgrund der Mitgliederschaft erscheint von rechtlicher Seite darin, daß für die Tätigkeit der zwischenstaatlichen Organisationen

[6] Siehe darüber: Токарева, П.: *Международный организационноправовой механизм социалистической экономической интеграции.* Moskau, 1980. p. 29. et seq.

[7] Ширяев, Ю.: op. cit. p. 71.

[8] *Теория и практика социалистической интеграции.* Moskau, 1975, p. 86 et seq.

[9] Токарева, П.: op. cit. p. 31.

[10] Siehe darüber *Особенности международного социалистического общественного производства.* Moskau, 1973, p. 93..

die Normen des Völkerrechts maßgebend sind, während die Funktionierung der Zwischenbetriebsorganisationen hauptsächlich durch die Normen des nationalen Rechts, beziehungsweise des internationalen Privatrechts geregelt werden. Dies gilt auch dann, wenn in der bisherigen Praxis die zwischen-betrieblichen Organisationen, (z. B. internationale Wirtschaftsorganisationen) nicht durch zivilrechtlichen Vertrag, sondern durch zwischenstaatliches Abkommen (internationalem Vertrag) gegründet worden sind, was den Organisationen selbstverständlicherweise eine Eigenart, einen „öffentlichrechtlichen" Charakter verleiht.

Das zweite Merkmal der Differenzierung, der *Charakter der Tätigkeit*, gibt zur mehrfachen Klassifizierung Möglichkeit. Es gibt z. B. einen Standpunkt, der von *koordinierende, wirtschaftende* und *verwertende* (Außenhandels-) Tätigkeit ausübenden Organisationen spricht.[11] Andere wieder behandeln, neben den koordinierenden und wirtschaftenden gemeinsamen Organisationen, die Organisationsformen für *Informationserteilung* und *Erfahrungsaustausch* separat, die übrigens die lockersten Organisationsformen sind.[12]

Es ist klar, daß neben diesen beiden grundlegenden Klassifikationsmerkmalen gegebenenfalls selbstredend auch andere Kriterien Daseinsberechtigung haben. Es kann z. B. aufgrund der Entscheidungsordnung, beziehungsweise der Separiertheit von den Mitgliedern, also aufgrund des Ausmaßes der „effektiven Macht" der Organisation, von einem Typ der gemeinsamen Organisationen gesprochen werden, wie z. B. Organisationen die bloß Empfehlungen akzeptieren, wo das entscheidende Wort den *einzelnen Mitgliedern* zufällt. In diese Gruppe gehören offenbar die gemeinsamen Institutionen zwischenstaatlichen Charakters. Eine Spezialität der anderen Gruppe der gemeinsamen Organisationen ist dagegen, daß der Grad der Getrenntheit des Lenkungsorgans der Organisation kräftiger ist, das heißt, es kann nicht nur Empfehlungen vorlegen, sondern in bestimmten Fällen auch für die Mitglieder bindende Entscheidungen fällen. In diese Gruppe gehören in erster Linie die gemeinsamen Unternehmungen, nämlich die internationalen Wirtschaftsorganisationen.

Bei der Untersuchung der Struktur des Institutionssystems der Integration muß der *RGW selbst* separat behandelt werden. Es kann dabei, zum Beispiel, darauf hingewiesen werden, daß er, im Vergleich mit den anderen gemeinsamen Organisationen der Kooperation, nach seinen Tätigkeitsbereich die umfassendste zwischenstaatliche Organisation ist.[13] Andererseits ist das Niveau der Vertretung der Mitgliedstaaten im RGW das höchste; man könnte sogar sagen, daß der RGW eine

[11] Кормнов, Ю.: *Развитие международных экономических организаций в социалистической экономической интеграции.* Prag, 1974, p. 44.

[12] Siehe: *Проблемы социалистической экономической интеграции.* Moskau, 1974, p. 232 et seq.

[13] Der Funktionsbereich des RGW umfaßt gegenwärtig sämtliche wesentliche Gebiete der wirtschaftlichen und wissenschaftlich-technischen multilateralen Kooperation. Auf diesen in dieser Beziehung bestehenden speziellen Zug des RGW wird in der Literatur mehrerseits hingewiesen. (S.z.B.: *Международные организации социалистических стран,* Moskau, 1971, p. 80 et seq.)

typische Interregierungsorganisation ist, während in den im Zuge der Kooperation entstandenen sonstigen zwischenstaatlichen Organisationen die Mitgliedstaaten durch ihre Ministerien (Oberbehörden) vertreten werden.

Schließlich muß auch darauf hingewiesen werden daß in das Institutionssystem der Integration sowohl die *multilateralen,* als auch die *bilateralen* gemeinsamen Institutionen hineingehören. Aus diesem Gesichtspunkt betrachtet ist die mitunter auftauchende Anschauung kaum haltbar, die die bilaterale, bzw. multilaterale Kooperation voneinander kraß trennt, ja diese sogar einander gelegentlich gegenüberstellt. Die bilateralen und multilateralen Formen können auch auf dem Niveau des Institutionssystems nur in ihrer gegenseitigen Verbindung, einander ergänzend, gemeinsam untersucht werden, auch dann, wenn sie in ihrer gemeinsamen Institutionsqualität, miteinander verglichen, natürlicherweise auch spezielle Eigenheiten vorweisen mögen. Dieses Erkenntnis ist heute auch schon in der bezüglichen normativen Regelung ein praktisches Erfordernis. Im Zusammenhang damit können wir z. B. auf die in 1979 vorgenommenen Änderung des Grunddokuments des RGW hinweisen, wo es heißt, daß die Mitgliedstaaten in der zwei- bzw. mehrseitigen Kooperation in Rahmen des Rates durch den RGW unterstützt werden.[14]

Unter Beachtung der soeben gesagten kann eine *engere* und eine *breitere* Kategorie des Institutionssystems der Integration unterschieden werden. In *engerem* Sinne gehören in den Begriff des internationalen Institutionssystems der Integration bloß die *zwischenstaatlichen,* durch das Völkerrecht geregelten gemeinsamen Organisationen (z. B. die auf dem Gebiet der wissenschaftlich-technischen Kooperation entstandenen multilateralen zwischenstaatlichen Organisationen, bilaterale Interregierungsausschüsse der Kooperation, usw.).

In *weiterem* Sinn umfaßt die Kategorie des Institutionssystems der Integration, neben den bilateralen und multilateralen zwischenstaatlichen Organisationen, auch jene gemeinsamen Organisationen *internationalen Charakters,* wie die gemeinsamen Institute, gemeinsame Laboratorien, internationale Wirtschaftsorganisationen (internationale Assoziationen, gemeinsame Unternehmen, internationale Gesellschaften) usw. Anhand dessen taucht selbstredend der Anspruch auf die Sicherung der Wechselwirkung zwischen diesen beiden Ebenen des Institutionssystems auf, das sich sowohl *mittelbarerweise,* durch Einschaltung von nationalen Lenkungssystemen, als auch *unmittelbarerweise,* nämlich durch Regelung auf einem entsprechenden Niveau realisiert, ohne natürlich, daß rigorose hierarchische über- und untergeordnete Verhältnisse in internationaler Beziehung entstünden.

Bei der Untersuchung der Kategorie des Institutionssystems der Integration müssen, über die statische Betrachtung hinaus auch die *Funktionierung,* die *Dynamik* desselben in Betracht gezogen werden. Das bedeutet unter anderen, daß in der Kategorie des Institutionssystems auch die Elemente der Tätigkeit der gemeinsamen Institutionen inbegriffen sind, das heißt jene *Mittel* und *Methoden,* mit Hilfe deren der

[14] Siehe: *Grunddokument* des RGW. Art. III, Punkt 1 „d".

Institutionsmechanismus auf die Integrationsvorgänge Einfluß, Einwirkung ausübt. Die Betonung dieser Beziehung des Problems ist auch schon deshalb wichtig, weil die Wirksamkeit der Gesamtheit des Institutionssystems, aber auch der einzelnen Kettenglieder desselben dadurch erwogen werden können, daß man feststellt, wie weit und mit welchem Wirkungsgrad die angewendeten Mittel und Methoden die praktische Verwirklichung der Zielsetzungen der Integration sichern. Anhand dessen muß die Wichtigkeit der Wirksamkeitsbereiche und der angewendeten Ordnung der Entscheidungsberechtigung zwischen den in das Institutionssystem gehörenden gemeinsamen Organisationen, ferner zwischen den inneren Organen der einzelnen gemeinsamen Organisationen (z. B. Exekutivkomitee des RGW und ständige Kommissionen, usw.) separat hervorgehoben werden.

II

Der institutionelle Mechanismus der sozialistischen Wirtschaftsintegration bildet, auf das *innere Verbindungssystem gebaut*, ein einziges Ganzes. Diese Einheit des Institutionssystems wird durch das mehr oder minder umreißbare Zielsystem, durch die für einen längern Termin abgestimmte Wirtschaftspolitik der Kooperation bestimmt.[15] Abhängig davon an welchem Gebiet, beziehungsweise an welcher Ebene der Kooperation der einzelnen Institutionen sie ihre Tätigkeit entwickeln, ist ihre Aufgabe und Rolle in dem Vorgang der praktischen Verwirklichung der abgestimmten wirtschaftspolitischen Ziele selbstredend unterschiedlich. Daraus ergibt sich teilweise, daß die durch die abgestimmten wirtschaftspolitischen Zielsetzungen umrissene Einheit des Institutionssystems auch durch organisatorisch-rechtlichen Mitteln unterstützt zu werden braucht. In diesem Zusammenhang besteht die Rolle der organisatorisch-rechtlichen Mittel besonders in der Sicherung der erwünschten Koordination und Verbindung zwischen den einzelnen Institutionen), bzw. Institutionsgruppen, sowie in der Ausschaltung eventueller Parallelitäten, Überdeckungen, usw.

Bei den in das Institutionssystems der RGW-Integration gehörenden gemeinsamen Organisationen finden wir verschiedenartige Beziehungen.[16] Dementsprechend bestehen Beziehungen zwischen den zwischenstaatlichen Organisationen untereinander, und innerhalb deren Beziehungen zwischen dem RGW und der an einzelnen bestimmten Stellen der Kooperation tätigen zwischenstaatlichen Organisationen, ferner Beziehungen der zwischenstaatlichen kooperativen Organisationen — darunter des RGW — mit den interbetrieblichen gemeinsamen Organisationen, das heißt den

[15] Das Zielsystem der Wirtschaftspolitik der Kooperation wird neben dem Komplexprogramm hauptsächlich in den langfristigen Kooperations-Zielprogrammen abgefaßt.

[16] Eine spezielle Untersuchung verdient das System der äußeren Beziehungen des RGW, das in den letzteren Jahren sowohl bei den nicht Mitgliedländern, als auch gegenüber den internationalen Organisationen eine immer breiter werdende Entwicklungstendenz aufweist.

internationalen Wirtschaftsorganisationen, und schließlich Verhältnisse dieser letzteren miteinander. Aufgrund prinzipieller Überlegungen, aber auch wichtigkeits halber wollen wir uns im weiteren mit *zwei Beziehungen* dieses vielfältigen inneren Beziehungssystems befassen, namentlich: mit einigen aus rechtlichem Gesichtspunkt interessant erscheinenden Momenten der Beziehungen und des gegenseitigen Verhältnisses (a) des RGW und der an bestimmten Gebieten der Kooperation tätigen zwischenstaatlichen Organisationen und (b) des RGW und der internationalen Wirtschaftsorganisationen.

(a) Die Beziehungen und Verhältnisse zwischen dem *RGW und der an sonstigen Gebieten der Kooperation gegründeten zwischenstaatlichen Organisationen* werden vor allem durch den Umstand bedingt, daß sowohl der RGW, als auch die genannten Organisationen ihrem Charakter nach zum selben Organisationstyp gehören, sie sind Subjekte des Völkerrechts. Demzufolge ist das Verhältnis unter ihnen ein *beigeordnetes* Verhältnis, das Verhältnis internationaler Organisationen gleichen Charakters zueinander. Bei der Untersuchung ihrer Beziehungen muß aber auch die zentrale Rolle des RGW innerhalb des Institutionssystems der Kooperation vor Augen gehalten werden.

Die *rechtlichen Grundlagen* der Beziehungen und der Koordination zwischen dem RGW und den sonstigen zwischenstaatlichen Organisationen der Kooperation werden durch das Komplexprogram, durch die Gründungsurkunden der einzelnen zwischenstaatlichen Organisationen, sowie durch die die Fragen des Verhältnisses zwischen dem RGW und diesen Organisationen regelnden Abkommen (Protokolle) bestimmt.

Das Grunddokument des RGW stellt im Zusammenhang damit fest, daß die durch die Mitgliedstaaten zwecks Zusammenarbeit auf dem Gebiete der Wirtschaft, der Wissenschaft, der Technik gegründeten internationalen Organisationen mit dem RGW in vertraglicher Beziehung stehen und das der RGW seine Tätigkeit, aufgrund der geschlossenen Vereinbarungen, seine Tätigkeit mit der Tätigkeit dieser Organisationen abstimmt. (Art. XII).

Die konkreten Regeln und Prinzipien der Beziehungen und der Kooperation zwischen dem RGW und den sonstigen auf einzelnen Gebieten der Kooperation zustandegebrachten Organisationen sind auch durch das Komplexprogramm geregelt.

Das Programm berührt die Beziehungen und die Zusammenarbeit des RGW und der sonstigen zwischenstaatlichen Organisationen der Kooperation in mehreren Beziehungen. Aus dem Gesichtspunkt der unsererseits zu untersuchenden Frage verdienen die folgenden *drei* Momente Aufmerksamkeit: die den Mitgliedstaaten obliegenden Verbindlichkeiten, die Form und der Charakter der Kooperation und die Hervorhebung der Selbstständigkeit der zwischenstaatlichen Organisationen.

Im Zusammenhang mit der ersten Fragen hält das Komplexprogramm fest, daß die Mitgliedstaaten Verfügungen treffen dahingehend, daß die Tätigkeit der durch die betreffenden Staaten aufgrund der *RGW-Prinzipien* gegründeten, auf dem Gebiete der

Wirtschaft, der Wissenschaft und der Technik mit weitreichender Verantwortung ausgestatteten zwischenstaatlichen Organisationen mit der Tätigkeit des RGW harmonisieren. Das Komplexprogramm schreibt ferner vor, daß die Mitgliedstaaten Verfügungen treffen, daß die im Zusammenhang mit den Fragen der Kooperation zusammenhängenden RGW-Empfehlungen bei der Tätigkeit der durch sie gegründeten zwischenstaatlichen Wirtschaftsorganisationen in Betracht gezogen werden. Und schließlich stellt das Programm fest, daß die Mitgliedstaaten, bei der Gründung der zwischenstaatlichen Organisationen, in den Gründungsdokument dieser Organisationen jene Bestimmungen festlegen, die zur Aufnahme der Beziehungen mit dem RGW notwendig sind.

Das Komplexprogramm weist im weiteren auf den Charakter und auf die Form der Kooperation hin. Die Zusammenarbeit richtet sich grundlegend auf die notwendige Realisierung der *Koordination*. Bezüglich der Form der Koordination stellt das Programm fest, daß sich diese Koordination aufgrund der zwischen dem RGW und dieser Organisationen zum Abschluß gelangenden Abkommen und Protokolle realisiert.

Auch aus dem Gesichtspunkt des Inhalts der Kooperation zwischen dem RGW und der bezüglichen zwischenstaatlichen Organisationen ist jene These des Programms von Bedeutung, welche besagt, daß die mit dem RGW in Vertragsverhältnis gelangten zwischenstaatlichen Organisationen selbständige zwischenstaatliche Organisationen der Mitglieder bleiben und aufgrund ihrer Gründungsurkunden funktionieren.[17]

Die rechtliche Grundlage der Beziehung und der Koordination zwischen dem RGW und den zwischenstaatlichen Organisationen wurde auch *in den Gründungsurkunden der bezüglichen zwischenstaatlichen Organisationen* niedergelegt. Bis zur Annahme des Komplexprogramms legten die Gründungsurkunden, meist in einem separaten Artikel, jenes Recht der Organisation fest, daß sie mit anderen internationalen Organisationen Verbindungen herstellen kann. Die Gründungsurkunden der nach der Annahme des Komplexprogramms gegründeten zwischenstaatlichen Organisationen machen insofern einen Schritt vorwärts, daß sie auf die Kooperation mit der RGW unmittelbar hinweisen.

Das Gründungsabkommen der im Jahre 1973 gegründeten zwischenstaatlichen Organisation „Interelektro" hält fest, daß sie ihre Tätigkeit im Einklang mit der vorliegenden Vereinbarung ... sowie mit den ihren Tätigkeitsbereich berührenden Empfehlungen und Entscheidungen des RGW ausüben wird. Es weist ferner darauf hin, daß das Interelektro seine Tätigkeit mit der Arbeit der RGW-Organe abstimmt, besonders in Bezug auf die Realisierung der bezüglichen Verfügungen des Komplexprogramms. (Gründungsabkommen des Interelektro, Art. II, Seite 2.)

Die kontrahierenden Partner in den Kooperationsvereinbarungen zwischen dem RGW und sonstigen zwischenstaatlichen Organisationen sind einerseits der

[17] Siehe: *Komplexprogramm*, Kap. 16, Punkt 6.

RGW als internationale Organisation (und nicht das betreffende RGW-Organ!), andererseits die zuständige zwischenstaatliche Organisation. Es ist notwendig dies auch separat festzuhalten, da in den Kooperationsprotokollen im allgemeinen erwähnt wird, welche RGW-Organisation es ist, über welche die bezügliche internationale Organisation mit dem RGW konkret zusammenarbeitet. Andererseits ist es aber offenbar, daß über eine Rechtsfähigkeit zur Herstellung von Kooperation und Beziehungen mit anderen internationalen Organisationen nur der RGW als internationale Organisation, nicht aber seine einzelnen Organe verfügen. Das ist auch dann der Fall, wenn die Kooperation mit einer internationalen Organisation im Namen des RGW für den RGW durch eines seiner konkreten Organe realisiert wird.

Praktisch hat der RGW mit sämtlichen zwischenstaatlichen Organisationen der Kooperation Kooperationsvereinbarungen (Kooperationsprotokolle) geschlossen.[18] Die Analysierung dieser Protokolle zeigt, daß sie ihrem Inhalt nach zahlreiche gemeinsame Elemente aufweisen, wenn auch, abhängig von dem Charakter der Organisationen, gewisse Eigenheiten existieren (siehe z. B. die Kooperationsprotokolle mit der Internationalen Bank für wirtschaftliche Zusammenarbeit und der Internationalen Investitionsbank).

In den Kooperationsprotokollen wird hervorgehoben, daß sich die Kooperation nach dem Prinzip der Wechselseitigkeit vollzieht. Als *Hauptmethoden* der Kooperation zwischen dem RGW und den zwischenstaatlichen Organisationen sind folgende vorgesehen: gegenseitige Abstimmung der Arbeitspläne, eine wechselseitige Information, gemeinsame Ausarbeitung von Themen, systematischer Austausch der bezüglichen Materialien und Dokumente (Protokolle), gegenseitige Teilnahme in den Veranstaltungen und Tagungen der Organe, Organisierung von gemeinsamen Arbeitsgruppen usw. Es sei bemerkt, daß sich in der Praxis auch eine weitere Kooperationsform verbreitet hat, und zwar die Besprechung von umfassenden Referaten über die Tätigkeit der einzelnen zwischenstaatlichen Organisationen im Rahmen der Sitzungen von RGW-Organen, vor allem des Exekutivausschusses, zum Teil aber auch einzelner zweiglichen ständigen Kommissionen, was auch eine wirksame Form der wechselseitigen Koordination ist. Die neueste Entwicklung zieht die Formung engerer und wirksamer Beziehungen zwischen dem RGW und sonstigen zwischenstaatlichen Kooperationsorganisationen vor[19] ohne daß das in dem Charakter und in der Natur der Beziehung wesentliche Veränderung verursacht hätte. Die in der letzten Zeit abgeschlossenen Kooperationsprotokolle heben in dieser Beziehung hervor, daß diese Organisationen im Laufe ihrer Funktionierung die an sie gerichteten und sich auf die Gesamtheit der Kooperation beziehenden Entscheidungen der *RGW-Sitzungsperiode* und des *Exekutivkomitees*, und die sich auf die Ganzheit der

[18] Es sei bemerkt, daß, mit Hinsicht auch auf die praktischen Erfahrungen, der RGW in 1980 mit den bezüglichen zwischenstaatlichen Organisationen neue Kooperationsabkommen geschlossen hat.

[19] Die praktische Realisierung der langfristigen Kooperations-Zielprogramme setzt unter anderen eine kräftigere Organisationsintegration voraus, als die frühere gewesen ist.

Kooperation beziehenden, im Rahmen des RGW ausgearbeiteten normativ methodischen Urkunden für maßgebend erachten.

Auch prinzipiell ist es eine interessante Frage, wie und in welcher Qualität die zwischenstaatlichen Organisationen mit dem RGW verbunden sind. Über diese Frage entfaltete sich auch in der Literatur eine weitverbreitete Debatte. Die Debatte wurde dadurch entfacht, daß das Komplexprogramm, das Verhältnis des RGW und dieser Organisationen behandelnd, eine Erklärung enthält, gemäß deren diese Organisationen (das heißt die zwischenstaatlichen Organisationen), als *spezialisierte* Organisationen mit dem RGW verbunden sind. (Komplexprogramm, Kap. 16, Punkt 5.) Aufgrund dessen stellt sich die Frage, wie und in welchem Sinne von einer Qualifizierung der zwischenstaatlichen Organe als spezialisierte Organe die Rede sein kann. Mit anderen Worten: soll der Ausdruck „spezialisierte Organisation" so verstanden werden, wie es sich in der internationalen Praxis eingebürgert hat (z. B. als Analogie der spezialisierten Organisationen der NATO), oder hat dieser Ausdruck eine andere Bedeutung speziellen Inhalts. Wie das aus dem zitierten Wortlaut des Komplexprogramms hervorgeht, gibt das Programm auf diese Frage keine eindeutige Antwort.

In der Literatur haben sich diesbezüglich zwei, einander gewissermaßen widersprechende Standpunkte herausgeformt:

Aufgrund der Analysierung der bezüglichen Thesen des Komplexprogramms, ferner aufgrund der Analyse der bereits erwähnten Kooperationsvereinbarungen, vertreten Viele den Standpunkt, daß die *Mehrheit* (aber nicht die Gesamtheit) der zwischenstaatlichen Organisationen als *spezialisierte Organisationen des RGW* zu betrachten sind.[20] Das ist vor allem damit begründet, daß die Tätigkeit dieser Organisationen eng mit der Funktion des RGW verbunden ist.

Diese Autoren bezeichnen als grundlegende Merkmale der spezialisierten Organisationen des RGW, übereinstimmend mit dem Komplexprogramm, die folgenden:

(a) sie funktionieren nach den Prinzipien des RGW,

(b) sie sind auf dem Gebiet ihrer Tätigkeit mit einer weitgehenden Verantwortung ausgestattet,

(c) sie stehen mit dem RGW in vertraglicher Kooperationsbeziehung,

(d) diesem letzteren zufolge stimmen sie ihre Tätigkeit eng mit der Tätigkeit des RGW ab.

Auch diese Autoren betonen aber, daß es zur Vervollständigung und klarer Gestaltung des spezialisierten Status dieser Organisationen einer weiteren Ausbreitung und Vertiefung der Koordination zwischen diesen Organisationen und des RGW bedarf.[21] Im Interesse der Regulierung des Rechtsstatus der spezialisierten Organisationen des RGW schlagen sie die Ausarbeitung einer internationalen Vereinbarung

[20] *Совет Экономической Взаимопомощи. Основные правовые проблемы.* Moskau, 1975, p. 286 et seq.

[21] Op cit. p. 308.

vor, die den Rechtsstatus der spezialisierten Organisationen umfassend regeln würde.[22]

Schließlich muß auch bemerkt werden, daß auch die Autoren, die sich zur Qualifizierung der zwischenstaatlichen Organisationen als spezialisierte Organisationen des RGW bekennen, betonen, daß die Behandlung dieser Organisationen als spezialisierte Organisationen keineswegs irgendwie die Beschränkung ihrer Selbständigkeit bedeuten kann; es kann zwischen diesen spezialisierten Organisationen und dem RGW keinerlei Subordination, keine Unter- und Übergeordnetheit herrschen.[23]

Dieser Auffassung gegenüber besteht in der Literatur auch eine andere Ansicht. Die Vertreter dieses letzteren leugnen es, daß die zwischenstaatlichen Organisationen spezialisierte Organisation des RGW wären. Sie begründen diese Auffassung damit, daß der im Komplexprogramm abgefasste Ausdruck „spezialisierte Organisation" vor allem nicht die rechtliche Qualifikation dieser Organisationen bedeutet, sondern im Wesentlichen jenen Umstand, daß sie ihre Tätigkeit, im Vergleich zum RGW, die seinem Tätigkeitsbereich nach in gewissem Sinne eine universale Organisation ist, auf einem engeren Kreis der Kooperation, auf einem spezifischen Feld ausüben. Die zwischenstaatlichen Organisationen sind also dem *Charakter ihrer Tätigkeit nach* spezifizierte Organisationen, und nicht *wegen ihrer Beziehung zum RGW*.[24]

Die Vertreter dieser Auffassung lenken die Aufmerksamkeit darauf, daß es äußerst schwierig wäre die zwischenstaatlichen Organisationen als spezifizierte Organe des RGW aufzufassen, schon deshalb, weil die zwischenstaatlichen Organisationen, gemäß der Zusammensetzung ihrer Mitgliedschaft, mehrerlei sind. So gibt es zwischenstaatliche Organisationen, deren Mitglieder nicht nur RGW-Länder, sondern auch andere sozialistische Länder sind (z. B. Eisenbahnkooperations-Organisation), oder in denen nicht sämtliche RGW-Länder, sondern nur einige von ihnen Mitglieder sind (z. B. Intermetall). Daraus ergibt sich, daß es hier nur von spezialisierten Organisationen *dieser Länder* gesprochen werden kann, nicht aber von den spezialisierten Organisationen des RGW. Dementsprechend können wir von spezialisierten Organisationen der *sozialistischen Länder*, von spezialisierten Organisationen der *interessierten* RGW-Mitgliedstaaten, und schließlich von spezialisierten Organisationen der RGW-Mitgliedländer sprechen.[25]

Die Vertreter dieses Standpunktes argumentieren auch damit, daß nicht in allen mit den zwischenstaatlichen Organisationen geschlossenen Kooperationsabkommen ausgedrückt wird daß sich die betreffende Organisation an den RGW als „spezifizierte Organisation" knüpft. Im Kooperationsabkommen des RGW mit der Bank für Internationalen Zusammenarbeit und der Internationalen Investitionsbank figuriert

[22] Op. cit. p. 309.

[23] Siehe: Токарева, П.: op. cit. p. 24. et seq.

[24] Siehe darüber Морозов, В.: *Международные экономические организации социалистических стран*. Moskau, 1968, p. 26.

[25] Cf. Морозов, В.: op. cit. p. 25.

eine derartige Abfassung überhaupt nicht, woraus gleichfalls darauf gefolgert werden kann, daß es verfehlt wäre die zwischenstaatlichen Organisationen als spezifizierte Organisationen zu betrachten. Unserer Meinung nach wäre es heute noch schwer auf die Frage, ob die zwischenstaatlichen Wirtschaftsorganisationen der Kooperation spezifizierte Organisationen des RGW sind oder nicht, eindeutige Antwort zu geben. Bei der Prüfung dieser Angelegenheit muß der Umstand in Betracht gezogen werden, daß die zwischenstaatlichen Organisationen der Kooperation nach dem Prinzip ihrer Tätigkeit und der Zusammensetzung ihrer Mitgliedschaft verschieden sind. Andererseits müssen die Formen und Methoden der Verbindung der verschiedenen zwischenstaatlichen Organisationen mit dem RGW, und der Inhalt ihrer Verbindung beachtet werden. Die Frage von dieser Seite betrachtet, kann die Verbindung der zwischenstaatlichen Organisationen und des RGW unseres Erachtens heute noch nicht als solche angesehen werden, das in jeder Beziehung sämtlichen Kriterien der „spezifizierten Organisationen des RGW" entsprechen würde. Es muß aber gleichzeitig betont werden, daß für eine bestimmte Gruppe der zwischenstaatlichen Wirtschaftsorganisationen jene Kriterien immer deutlicher werden, deren kräftigere Entfaltung, hauptsächlich aber die Vertiefung und weitere Ausbreitung des Inhalts dieser Verbindung diese Organisationen im Zuge der weiteren Entwicklung tatsächlich zur echten spezifizierten Organisationen des RGW machen könnte. Hier denken wir grundlegend und in erster Linie auf zwischenstaatliche Wirtschaftsorganisationen, die nach dem Prinzip des RGW arbeiten und deren Mitglieder RGW-Staaten sind.

(b) Im Vergleich mit den zwischenstaatlichen Organisationen haben im Institutionssystem der Kooperation die internationalen *Wirtschaftsorganisationen* (im weiteren IWO) einen speziellen Stand. Die spezifische Lage der IWO ergibt sich vor allem aus ihrem Charakter, aus ihrer rechtlichen Qualität.

Die IWO können nicht als Subjekte des Völkerrechts betrachtet werden, sondern sie verfügen über zivilrechtliche Rechtspersönlichkeit, genauer ausgedrückt: sie sind Rechtssubjekte des Rechts des Sitzlandes. Es versteht sich natürlich, daß sie aus ihrem internationalen Charakter herrührend *spezielle* Subjekte des nationalen Rechts sind, indem in den Gründungsurkunden die volle Anerkennung der Rechtspersönlichkeit der IWO auf dem Gebiete sämtlicher interessierten Länder gesichert erscheint.[26] Aus dieser rechtlichen Qualität der IWO folgt es, daß ihre organisatorisch-juristische Beziehung mit dem RGW anderer Natur ist, als die Beziehung des RGW und anderer auf bestimmten Gebieten der Kooperation tätigen zwischenstaatlichen ökonomischen Organisationen.

Bei der Untersuchung des Inhalts dieser Beziehung ist es notwendig zwei auch in der Literatur oft auftauchende Extremitäten zu vermeiden.

Das Wesen der einen Extremität besteht darin, daß sie die Beziehung zwischen der RGW und der internationalen Wirtschaftsorganisation im Grunde als eine

[26] Es sei bemerkt, daß auf diesen Umstand die Gründungsdokumente der bisher gegründeten internationalen Wirtschaftsorganisationen ausdrücklich hinweisen.

hierarchische *Über- und Untergeordnetheit* ansieht, und auf dem Standpunkt steht, daß die zuständigen Organisationen des RGW die IWO gemeinsam lenken.[27] Dieser Auffassung kann angesichts der im Grunddokument des RGW und im Komplexprogramm abgefaßten Kooperationsprinzipien nicht zugebilligt werden.

Das Grunddokument des RGW, wie auch das Komplexprogramm geht im ganzen System der Kooperation aus dem Prinzip der Gleichheit der Mitgliedstaaten aus. Das Programm hebt noch speziell hervor, daß die seitens der Mitgliedstaaten gegründeten internationalen Wirtschaftsorganisationen keinen übernationalen Charakter tragen dürfen. Darüber hinaus verrichten die IWO, aufgrund ihrer Gründungsurkunden ihre Tätigkeit selbständig. Deshalb soll der in der Literatur ausgedrückten Anschauung recht gesprochen werden, daß im System der internationalen Organisationen der sozialistischen Staaten keine Über- oder Untergeordnetheit existiert.[28]

Bei der Untersuchung der Beziehung des RGW und der IWO muß unserer Beurteilung nach auch eine andere, dem obigen entgegengesetzte Extremität vermieden werden. Ausgegangen von der oben beschriebenen Selbständigkeit der IWO, beziehungsweise mit Bezug darauf, existieren auch Auffassungen, die die Selbständigkeit der IWO quasi absolutisieren.[29] Eine derartige Annäherung dieser Frage verbergt die Gefahr, daß die IWO aus dem Institutionssystem der Koordination herausgerissen wird.

Bei der Beantwortung dieser Frage soll davon ausgegangen werden, daß die IWO Komponente des in weitem Sinne genommenen Institutionsmechanismus der Kooperation sind und demzufolge ist die Sicherung der entsprechenden Koordination zwischen den entsprechenden Organen des RGW und der IWO unvermeidlich.

Die rechtliche Grundlage der Verwirklichung der Koordination wurde — außer dem Komplexprogramm — auch in den *Gründungsurkunden* der IWO, sowie *in den die Schaffung von unmittelbaren Arbeitsbeziehungen zwischen dem RGW-Sekretariat und den Exekutivorganen (Direktorien) der internationalen Wirtschaftsorganisationen zum Ziele habenden Protokollen* abgefaßt.

Aufgrund der Analysierung dieser Protokolle kann festgestellt werden, daß die Arbeitsbeziehungen auf die enge Harmonisierung der Tätigkeit der bezüglichen RGW-Organe und der IWO gerichtet sind.

Die Formen und Methoden der Arbeitsbeziehungen sind die folgenden:

a) wechselseitige Information über die Arbeitspläne, beziehungsweise deren entsprechende Abstimmung,

[27] Die Darlegung dieser Auffassung s. z.B. Cizkovsky: *Der Mechanismus der planmäßigen Lenkung der wirtschaftlichen Kooperation in der sozialistischen Integration der RGW-Mitgliedstaaten.* Prag, 1975, p. 16.

[28] Siehe: *Совет Экономической Взаимопомощи. Основные правовые проблемы.* Moskau, 1975, p. 398.

[29] Die Darlegung dieser Auffassung siehe Janik: *Die rechtlichen Probleme der gemeinsamen Unternehmen.* Sprawy Miezdunarodowe, 7—8/1975.

b) Schaffung einer ständigen und laufenden Arbeitsbeziehung, beziehungsweise deren Aufrechterhaltung im Zuge der Vorbereitung von Materialien im Zusammenhang mit den bedeutenderen Fragen der Kooperation; Austausch von in den Sitzungen zur Debatte stehenden Arbeitsdokumente,

c) wechselseitige Information über die in den Sitzungen angenommenen Beschlüssen.

Die Arbeitsbeziehung zwischen dem Sekretariat des RGW und dem Direktorium der internationalen Wirtschaftsorganisation realisiert sich über die seitens des Leiters der zwei Organe ermächtigten Vertretern.

Eine besondere Form der Beziehung der durch den RGW und den Mitgliedstaaten gegründeten gemeinsamen Organisationen ist es, wenn die Organe des RGW an diese Organisationen gerichtete *Empfehlungen* annehmen. Die Empfehlungen dieser Natur sind, im Vergleich mit den Typischen RGW-Empfehlungen, auch ihrem Charakter nach speziell.

Aufgrund der Hauptmerkmale der RGW-Empfehlungen — die wir später ausführlich darlegen werden — kann festgestellt werden, daß die durch die RGW-Organe an die internationalen Wirtschaftsorganisationen adressierten Empfehlungen nicht für RGW-Empfehlungen gelten können, wie sie in der Grundurkunde des RGW niedergelegt sind. Das geht vor allem daraus hervor, daß die Grundurkunde des RGW ausschließlich von Empfehlungen, adressiert an die Mitgliedstaaten spricht und keinerlei Verfügungen über Empfehlungen an die seitens der Mitgliedstaaten gegründeten internationalen Wirtschaftsorganisationen beinhaltet. Es sei bemerkt, daß auch das Komplex program von keiner an die internationalen Organisationen adressierten Empfehlungen spricht, sondern festlegt, daß die RGW-Mitgliedstaaten Verfügungen treffen, daß im Zuge der Tätigkeit der internationalen Wirtschaftsorganisation die RGW-Empfehlungen, die diese Organisationen betreffen in Betracht gezogen werden.

Auch das ist offenbar, daß infolge der Verschiedenheit der Adressaten, natürlich auch die *Rechtsfolgen der Empfehlungen* abweichend sind. Aus der in der Grundurkunde festgelegten Empfehlung entsteht gegebenenfalls eine Verbindlichkeit materiellen Charakters. Die an die internationalen Wirtschaftsorganisationen adressierten Empfehlungen haben aber keine derartige Folgen, aus diesen entsteht für die Organisationen, anderen internationalen Rechtssubjekten gegenüber, keine unmittelbare Verbindlichkeit.

Dasselbe sehen wir auch, wenn wir die Kooperationsprotokolle und die Gründungsurkunden durchblicken. Dort wird nämlich von einer *„Beachtung"* derartiger Empfehlungen seitens der internationalen Organisation gesprochen. Wie die betreffende internationale Organisation die RGW-Empfehlung beachtet und in welcher Form sie dieselbe realisiert, das hängt völlig von der *Einsicht* dieser Organisation ab. Daraus geht hervor, daß die unmittelbar an die internationalen Wirtschaftsorganisationen adressierten RGW-Empfehlungen, ihrer rechtlichen Natur

nach, keineswegs als irgendwelche „verbindliche Weisungen" zu betrachten sind, sondern eher die Stellungnahmen und Empfehlungen des RGW in solchen Fragen ausdrücken, deren Lösung, infolge des Gründungsdokuments, in den Aufgabenkreis und Wirkungsbereich der einzelnen internationalen Wirtschaftsorganisationen gehört.

III

Eines der wichtigsten Elemente der Funktionierung des Institutionssystems ist die Art der *Entscheidungsordnung*. Eine Differenz in der Entscheidungsordnung besteht hauptsächlich zwischen den in das Institutionssystem gehörenden Institutionsgruppen (zwischenstaatliche, beziehungsweise zwischenbetriebliche gemeinsame Institutionen), aber gewisse Eigenartigkeiten sind auch in der Entscheidungsordnung der in ein und dieselbe Institutionsgruppe gehörenden gemeinsamen Organisationen zu finden. Ohne darauf einzugehen, diese zweifelsohne beachtenswerte Unterschiede und Eigenartigkeiten darzulegen, möchten wir, wegen ihrer Wichtigkeit, im weiteren einige mit der Entscheidungsordnung des RGW, als wichtigste Organisation des Institutionssystems zusammenhängende Fragen berühren.

Für die Entscheidungsordnung des RGW ist jener früher bereits erwähnte Umstand bestimmend, daß der RGW seinem Charakter nach eine zwischenstaatliche (Interregierungs-) Organisation ist, deshalb hat er keinen von den Mitgliedern derselben völlig gesonderten, von denen völlig unabhängigen ausschließlichen Wirkungskreis. Das bedeutet nicht, daß der RGW, als internationale Organisation, keinen autonomen Willen besitzt. Im Gegenteil! Es geht nur darum, daß dieser Wille unmittelbar rechtsverbindlich für ihre Mitglieder keine völkerrechtliche Verpflichtung entstehen läßt, sondern es entstehen für die Mitgliedstaaten von den durch den RGW getroffenen Entscheidungen internationalrechtliche Verpflichtungen nur dann, wenn und, nachdem die einzelnen Länder diese in ihrem nationalen Rahmen *nachträglich* akzeptiert haben. Es muß noch bemerkt werden, daß eine derartige Auffassung der Entscheidungskompetenz des RGW nicht ausschließt, das der RGW *in bestimmten konkreten Fällen* durch die Mitglieder ermächtigt wird konkrete Schritte zu unternehmen (z. B. auf dem Gebiet der äußeren Beziehungen des RGW).

In die Entscheidungsbereich des RGW gehören *objektiverseits* all jene Fragen, die im Grunddokument als Aufgabe der Organisation bezeichnet sind. Andererseits aber werden die Grundlagen und rechtlichen Formen der Entscheidungsordnung durch die entsprechenden Bestimmungen des Grunddokuments (hauptsächlich Artikel IV des Grunddokuments), und durch die die RGW-Organe betreffende Geschäftsordnung und Prozeßregel bestimmt. Diese Regelung bringt jene Prinzipien zum Ausdruck, die die Basis der Entscheidungsordnung des RGW bilden. Diese sind im Wesentlichen die folgenden:

— die Mitgliedstaaten nehmen an jedem Abschnitt der Entscheidung mit gleichen Rechten teil,

— die Entscheidungsordnung des RGW kennt das Prinzip des Mehrheitsbeschlusses nicht, die Entscheidung geschieht aufgrund der *Einstimmigkeit* aller interessierten Staaten,

— in den meritorischen Fragen der Kooperation können nur die nach dem Prinzip der gleichen Vertretung funktionierenden Organe Entscheidungen treffen,

— aus den durch die RGW-Organe akzeptierten Entscheidungen entstehen für die Mitgliedstaaten unmittelbar keine materiellen Verbindlichkeiten, diese Entscheidungen werden für sie nach der nachträglichen Akzeptierung derselben verpflichtend.

Von den erwähnten Prinzipien müssen wir uns — schon wegen seiner praktischen Bedeutung — mit dem Prinzip der *Interessiertheit* befassen. Im allgemeinen bedeutet das Prinzip der Interessiertheit, daß es jedem Mitgliedstaat zusteht, in der im RGW auf die Tagesordnung gesetzten Kooperationsfrage Interessiertheit oder Uninteressiertheit zu bekennen. Eine der Rechtsfolgen der Bekennung der Interessiertheit ist, daß der zuständige Organ des RGW in der aufgeworfenen Frage nur mit Einverständnis sämtlicher interessierten Staaten Entscheidung treffen kann. Es soll übrigens bemerkt werden, daß die Interessiertheit der Mitgliedstaaten als positiv angenommen wird, wenn sie sich nicht uninteressiert erklärt haben. Andererseits kann die Tatsache, daß ein Land in der vorliegenden Frage Uninteressiertheit erklärt, beziehungsweise an der Entscheidung nicht teilgenommen hat, die übrigen Staaten nicht daran hindern, daß sie in der die Kooperation berührenden Frage, im Rahmen des RGW, für sie selbst wirksame Entscheidungen annehmen. Beide Seiten des Prinzips der Interessiertheit sind von Wichtigkeit, denn nur unter gleichzeitiger Wirksamkeit dieser doppelten Forderung kann das Beteiligungsrecht an den Entscheidungen vollständig und praktisch tatsächlich reell werden.

Sollte ein Land an der Entscheidung nicht Interessiert sein, beziehungsweise an der Entscheidung nicht teilgenommen haben, entsteht aus der Entscheidung für dieses Land gar keine Verpflichtung. Gleichzeitig aber hat es das Recht sich später dieser Entscheidung anzuschließen.

Was nun die *rechtliche Form* der seitens des RGW angenommenen Entscheidungen betrifft, sollen die folgenden Entscheidungsformen herausgehoben werden: (a) Beschluß, (b) Empfehlung, (c) abgestimmter Vorschlag. Dem muß gleich hinzugefügt werden, daß im System der Kooperation in der letzten Zeit auch eine, in vieler Beziehung den internationalen Abkommen ähnliche Form, wie die *unmittelbare Vereinbarung*, die zwar keine streng genommene Entscheidungsform des RGW ist, aber wegen ihrer Neuartigkeit und rechtlicher Natur besondere Aufmerksamkeit verdient.

(a) Die *innere* Funktionierung des RGW als internationale Organisation regelnde Entscheidungsform ist der *Beschluß*. Daraus ergibt sich, daß der Gegenstand des Beschlusses nicht die meritorische Zusammenarbeit, sondern die organisatorischen und Verfahrensprobleme ist. Beschlußfassungsrecht haben sämtliche RGW

Vertretungsorgane.[30] Der Inhalt dieses Wirkungskreises der einzelnen RGW-Organe ist durch das Grunddokument des RGW und durch die die einzelnen RGW Vertretungsorgane betreffenden Geschäftsregel bestimmt. Es sei bemerkt, daß es Fragen gibt, in denen die Beschlußfassung dem höchsten Organ des RGW, der Ratssitzung zugeteilt ist. Solche sind z. B.: Aufnahme eines neuen Mitglieds in die Organisation, die Modifizierung des Grunddokuments, usw. Da die Beschlüsse für die einzelnen Länder keine materielle Konsequenzen haben, bedarf es keiner nachträglichen Bestätigung seitens der Mitgliedstaaten. Demzufolge treten die Beschlüsse im allgemeinen nach ihrer Annahme in Kraft, falls diesbezüglich der Beschluß selbst keine andere Vorschrift enthält, beziehungsweise aus dem Charakter des Beschlusses bezüglich der Inkraftsetzung nichts anderes folgt.

(b) Unter den Entscheidungsformen des RGW haben die *RGW-Empfehlungen* eine zentrale Rolle. Es ist kein Zufall, daß auch in der Literatur die Debatten meist über die Beurteilung der rechtlichen Natur der Empfehlungen, ihrer verpflichtenden Kraft, usw. entfaltet hat, ohne jedoch in sämtlichen Streitfragen einen einheitlichen Standpunkt erreicht haben zu können.

Neben den praktischen Bezügen der Frage läßt es allein schon dieser Umstand begründet erscheinen, daß wir uns — wenn auch bloß skizzenhaft — mit der rechtlichen Natur der mit der RGW-Empfehlung zusammenhängenden Fragen näher befassen.

Bei der Untersuchung der charakteristischen Züge der RGW-Empfehlung kann als Ausgangspunkt dienen, daß mit der Annahme der Empfehlung[31] sogar *zwei Arten* von Rechtsverhältnissen entstehen: einerseits zwischen dem RGW und den an den Empfehlungen teilnehmenden Ländern; das ist dem Charakter des Rechtsverhältnisses nach verfahrensmäßig (das Sekretariat des RGW ist verpflichtet die im Protokoll des zuständigen Organs niedergelegte Empfehlung den berührten Ländern zuzusenden, und die betreffenden Länder sind verpflichtet diese binnen 60 Tagen zu untersuchen das Sekretariat des RGW, und über ihn die interessierten Partner, über die Annahme oder Zurückweisung zu verständigen); andererseits aber entsteht nach der nachträglichen Annahme der Empfehlung seitens der berührten Länder (Bekräftigung) Rechtsverhältnis auch zwischen den betreffenden Ländern. Dieses Rechtsverhältnis ist aber nunmehr nicht formell, sondern besitzt einen materiellrechtlichen Charakter und hat gegebenenfalls zur Folge, daß die berührten Länder einander gegenüber gegenseitig Verpflichtungen eingehen. Infolge der abweichenden Deutung dieser Doppelheit erklären einzelne Autoren die RGW-Empfehlung, nach der Annahme derselben seitens der Länder, automatisch für internationales Abkommen, andere wieder für *spezielles* internationales Abkommen (pactum sui generis), wieder

[30] Die Vertreterorgane des RGW sind die folgenden: Sitzungsperiode des Rates, das Exekutivkomitee, die Kooperationsausschüsse, die ständigen Kommissionen, die ständigen Konferenzen.

[31] Die „Annahme" der Empfehlung hat sogar zwei Momente: die Annahme der Empfehlung seitens des RGW-Organ und die Annahme der Empfehlung seitens des nationalen Organs der interessierten Länder.

andere erachten es für eine Entscheidungsform ohne verpflichtende Kraft.[32] Demzufolge gab es, besonders in den früheren Perioden der Kooperation, hauptsächlich in der Volkswirtschaftsliteratur, bezüglich der rechtlichen Natur der RGW-Empfehlungen Auffassungen, gemäß deren die RGW-Empfehlung ihrem Charakter nach kein rechtlicher, sondern ein moralischer Akt ist. Das bedeutet mit anderen Worten, daß die Realisierung der RGW-Empfehlungen nicht durch deren rechtlich zwingenden Charakter, sondern ihr moralisch-politisches Ansehen gesichert wird.

Es taucht die Frage auf, wie eigentlich das *Verhältnis* zwischen der *RGW-Empfehlung* und dem *internationalen Abkommen* beschaffen ist.

Bei der Untersuchung des gegenseitigen Verhältnisses der RGW-Empfehlung und des internationalen Abkommens müssen gleichzeitig *zwei* Momente in Betracht gezogen werden: es müssen einerseits jene gemeinsamen Züge, Berührungspunkte untersucht werden, die zwischen der RGW-Empfehlung und dem internationalen Abkommen bestehen, andererseits müssen jene *eigenartigen, spezifischen* Unterscheidungsmerkmale in Betracht gezogen werden, die für diese beiden charakteristisch sind.

Zwischen der RGW-Empfehlung und dem internationalen Abkommen bestehen zahlreiche *gemeinsame* Züge. Es ist z. B. sowohl das internationale Abkommen, als auch die RGW-Empfehlung *internationaler Rechtsakt*. Das bedeutet unter anderen, daß sie mit den allgemein anerkannten Prinzipien und Normen des internationalen Rechts in Einklang stehen müssen. Ein weiteres gemeinsames Merkmal ist, daß die RGW-Empfehlung, als internationales Abkommen, eine gewisse Willenseinheit der daran teilnehmenden Länder voraussetzt. Das stimmt auch dann, wenn bei der RGW-Empfehlung diese Willenseinheit im Rahmen einer internationalen Organisation entsteht, weshalb es sich hier nicht um die Willenseinheit von Staaten im allgemeinen, sondern von der Willenseinheit der in der gegebenen internationalen Organisation teilnehmenden Mitgliedstaaten handelt. Das bedeutet auch gleichzeitig, daß die RGW-Empfehlung nicht nur und nicht einfach die Verkörperung des einheitlichen Willens der interessierten Staaten ist, sondern daß sie auch die Willenserklärung der internationalen Organisation als solches repräsentiert. Insofern ist die RGW-Erklärung der *einseitige* Akt der internationalen Organisation, was sie aber vom internationalen Abkommen gleichzeitig auch unterscheidet. Bleiben wir aber einstweilen bei der Analysierung der Berührungspunkte der RGW-Empfehlung und des internationalen Abkommens. Ein weiterer gemeinsamer Zug derselben ist, daß sowohl die Annahme der RGW-Empfehlung, als auch der Abschluß des internationalen Abkommens durch Staaten und internationalen Organisationen angeregt werden kann. Ein gemeinsamer Zug ist ferner, daß gegebenenfalls sowohl aus der RGW-Empfehlung als auch aus dem internationalen Abkommen für die teilnehmenden

[32] Siehe ausführlicher: Усенко, Е.: *Юридические акты СЭВ.* — Совет Экономической Взаимопомощи. Основные правовые проблемы. Moskau, 1975, pp. 206—247.

Länder internationalrechtliche Verpflichtungen entstehen. Anhand dieser letzteren muß separat betont werden, daß sich die aus der RGW-Empfehlung und aus den internationalen Abkommen stammenden internationalrechtlichen Verpflichtungen, betreffend ihrer Rechtskraft, voneinander nicht unterscheiden. Als gemeinsamer Zug der beiden internationalen Rechtsakten gilt auch, daß die Realisierung der aus der RGW-Empfehlung, beziehungsweise aus dem internationalen Abkommen stammenden Verpflichtungen als internationalrechtliche Pflicht der teilnehmenden Länder gilt.

Neben den Erwähnten Berührungspunkten beziehungsweise gemeinsamen Merkmalen gibt es zwischen der RGW-Empfehlung und dem internationalen Abkommen eine ganze Reihe von Abweichungen. Diese Unterschiede bringen im Wesentlichen die *Spezifika* der RGW-Empfehlungen, verglichen mit den internationalen Abkommen, zum Ausdruck. Einige Eigenheiten der RGW-Empfehlungen in dieser Beziehung sind die folgenden:

(a) *Gegenstand* des internationalen Abkommens kann jedes beliebige Gebiet sein, das sich aus dem Verhältnis der Staaten untereinander ergibt. In diesem Sinn ist das internationale Abkommen die umfassendste Verbindung universellen Charakters zwischen den Staaten. Demgegenüber können Gegenstand der RGW-Empfehlung nur wirtschaftliche und technisch-wissenschaftliche Kooperationsfragen sein, die das Grunddokument zur Aufgabe des RGW gestellt hat.

(b) Eine gewisse Abweichung besteht zwischen der RGW-Empfehlung und dem internationalen Abkommen auch bezüglich des *Vorgangs ihrer Ausarbeitung*. Das internationale Abkommen ist, wie bekannt, das Resultat mindestens zweier das Abkommen zustande bringenden Staaten, wo die Tätigkeit selbst gar nicht geregelt ist. Abweichend davon ist die RGW-Empfehlung in vorbestimmtem Sinn ein *einseitiger* Akt des RGW als internationale Organisation, infolge dessen zwischen dem RGW und den an der Empfehlung teilnehmenden Ländern die bereits erwähnten Rechtsverhältnisse formellen Charakters entstehen, ohne selbstredend, daß der RGW in materiellrechtlichem Sinne Beteiligter der Empfehlung wäre. Ferner wird die Ordnung der Ausarbeitung (Annahme) der Empfehlung durch das Grunddokument des RGW, sowie seine sonstigen normativen Dokumente Geschäftsordnung und Prozeßregel bestimmt. Dementsprechend geht die Ordnung der Ausarbeitung (Annahme) der RGW-Empfehlung im Rahmen einer rechtlich geregelten Prozedur vor sich.

(c) Nach dem Inkrafttreten der internationalen Abkommen entstehen *unmittelbar* Rechte und Verpflichtungen zwischen den an diesem Abkommen teilnehmenden Mitgliedstaaten. Abweichend davon läßt die RGW-Empfehlung — als einseitiger Akt in vorbestimmtem Sinn — im Moment der Annahme seitens des RGW *in direkter Form* keine wechselseitigen Rechte und Verpflichtungen für die daran teilnehmenden Länder entstehen. Das ergibt sich unter anderen daraus, daß im Rahmen des gegebenen RGW-Organs die Vertreter der Staaten als Mitglieder der Organisation an der Annahme der Empfehlung teilnehmen und nicht als im vorhinein beauftragte Vertreter der betreffenden Staaten.

(b) Zur Inkraftsetzung der internationalen Abkommen bedarf es nicht in jedem Fall der nachträglichen Bestätigung (Bekräftigung), sie können im Moment ihrer Unterzeichnung in Kraft treten. Demgegenüber müssen die zuständigen nationalen Organe der teilnehmenden Staaten die RGW-Empfehlung in allen Fällen untersuchen und sich über die Annahme oder Zurückweisung äußern.

(e) Über die *Wirkungsdauer* und *Modifizierung* der internationalen Abkommen verfügt das Abkommen selbst. Demgegenüber enthält die RGW-Empfehlung bezüglich ihrer Wirkungsdauer und Abänderung (Modifizierung) im allgemeinen keine Verfügungen. Die Modifizierung, Abänderung, beziehungsweise die Außerkraftsetzung der RGW-Empfehlung kann sowohl aufgrund der Initiative der daran teilnehmenden Länder, als auch auf Anregung des RGW vorgenommen werden. Die Modifizierung, beziehungsweise die Außerkraftsetzung der Empfehlung gehört in den Wirkungskreis des RGW als internationales Organ.

Aus den dargelegten *gemeinsamen* Zügen der RGW-Empfehlung und des internationalen Abkommens, beziehungsweise aus den *Eigenheiten*, die sich in dieser Beziehung offenbaren, kann festgestellt werden, daß die Empfehlung ein *selbständiger*, eigenartiger internationalrechtlicher Akt ist. Ein auch der RGW-Empfehlung gegenüber geltend zu machendes Erfordernis ist, daß sie mit den allgemein akzeptierten Prinzipien und Normen des internationalen Rechts und mit den Vorschriften des Grunddokuments des RGW und ihren sonstigen normativen Dokumenten in Einklang stehen muß. Unserer Beurteilung nach wird sie auch nach der nachträglichen Annahme (Bekräftigung) seitens der Mitgliedstaaten nicht automatisch zum internationalen Abkommen, sondern sie behält in bestimmten Sinne ihren *selbständigen Charakter*, wenn sie auch mit dem internationalen Abkommen zahlreiche ähnliche Züge aufweist. Der erwähnte selbständige Charakter kommt unter anderen auch darin zum Ausdruck, daß die Änderung (Modifizierung) und Außerkraftsetzung der Empfehlung in allen Fällen dem RGW als internationale Organisation vorbehalten ist. Es kann also als Endergebnis festgehalten werden, daß aus der RGW-Empfehlung nach der nachträglichen Annahme seitens der Länder *Rechte und Verpflichtungen mit internationalrechtlicher Kraft entstehen*, ohne jedoch, daß sie selbst unmittelbar zu internationalem Abkommen werden würde.

Aus der von den interessierten Ländern angenommenen Empfehlung entstehen Verpflichtungen sogar in *zwei Verhältnissen*, und zwar; (a) in der wechselseitigen Beziehung der an der Empfehlung teilnehmenden Länder; diese Verpflichtungen sind gewöhnlich internationalrechtliche Verbindlichkeiten materiellen Charakters, (b) Verpflichtungen der an der Empfehlung beteiligten Mitgliedländer in RGW-Relation; diese letztere Verpflichtung entsteht aus jener Verfügung des Grunddokuments, daß die Mitgliedstaaten übereingekommen sind die Verwirklichung der ihrerseits angenommenen Empfehlungen sicher zu stellen, beziehungsweise den Rat über deren Durchführung zu orientieren. (Art. II, Punkt 4 a) und d)).

(c) Eine spezielle Form der RGW-Entscheidung ist der *abgestimmte Vorschlag*. Mit einem derartigen Entscheidungsrecht werden durch die bezüglichen normativen

Dokumenten unter den Vertretungsorganen des RGW die sogenannten ständigen Sitzungen[33] ausgestattet, die übrigens über kein unmittelbares Empfehlungsrecht verfügen.

Abweichend von der RGW-Empfehlung entstehen aus den abgestimmten Vorschlägen für die Mitgliedstaaten keine Verpflichtungen mit rechtlicher Geltung, deshalb müssen sie auch nicht nachträglich bestätigt werden. Die Verwirklichung der abgestimmten Vorschläge geschieht deshalb in den einzelnen Ländern *nach ihrem Belieben*, im Einklang mit ihrer inneren Ordnung.[34]

Über die *unmittelbare Vereinbarung* muß separat gesprochen werden. Diese Form wurde früher besonders im Kooperationsausschuß für Planung angewendet. Diese Form wurde übrigens in der Geschäftsordnung dieses RGW-Organs zum erstenmal erfaßt, hauptsächlich in Angelegenheiten, die eine operative Entscheidung beanspruchten, bei denen aber die Annahme der RGW-Entscheidung nicht begründet, oder möglich war. Neuerlich wurde diese Form, nach der Modifizierung des Grunddokuments in 1979, auch in die Grundurkunde aufgenommen,[35] wodurch ihre Anwendungssphäre bedeutend erweitert wurde.

Wie kann diese Form aus rechtlichem Gesichtspunkt qualifiziert werden?

Wie darauf bereits hingewiesen wurde, ist eine derartige Vereinbarung nicht die Entscheidungsform des RGW als internationale Organisation, sondern der Akt *unmittelbar der Mitgliedstaaten*. Daraus ergibt sich, daß in einer Kooperationsfrage die *ermächtigten Vertreter der Mitgliedstaaten* unmittelbar Vereinbarung schließen können. Eine derartige Vereinbarung tritt in der durch die Staaten bestimmten Ordnung in Kraft, beziehungsweise die nachträgliche Bestätigung ist — falls sich die Länder nicht anderweitig vereinbart haben — keine Vorbedingung der Inkrafttretung. In dieser Beziehung führt die unmittelbare Vereinbarung mit dem internationalen Abkommen gemeinsame Merkmale. Ihre Verbindung mit dem RGW meldet sich in erster Linie darin, daß solche Vereinbarungen im Rahmen der RGW-Organe zustande kommen und in den Protokollen derselben festgelegt sind. Die unmittelbare Vereinbarung kann also ihre rechtliche Natur betreffend als *quasi internationales Abkommen*, als *atypisches* internationales Abkommen genannt werden.

Die normativen Dokumente des RGW machen zwischen den durch die verschiedenen RGW-Organe angenommenen rechtlichen Akten (Entscheidungsformen) aus dem Gesichtspunkt der Rechtskraft keinen Unterschied. Das bedeutet, daß die durch die einzelnen RGW-Organe angenommenen Rechtsakte (Entscheidungsformen), mindestens nach *außen hin*, nicht als Akte der einzelnen Organe, sondern als

[33] Die im RGW gegenwärtig tätigen ständigen Konferenzen sind die folgenden: Juristische Konferenz, Konferenz der Leiter der Preisämter, Konferenz der Leiter des Wasserversorgungsämter, Konferenz der Leiter der Erfindungsämter, Konferenz der Minister für den Binnenhandel, Konferenz der Minister für Arbeitswesen.

[34] Eine weitere Untersuchung beansprucht die Frage, bei welchen Typen der Kooperationsfragen diese rechtliche Form am besten angewendet werden kann.

[35] Siehe: *Grunddokument* des RGW, Art. IV, Punkt 4.

Akte des RGW als internationale Organisation erscheinen. In diesem Sinne können wir also nicht von einer Hierarchie unter den rechtlichen Akten (Entscheidungsformen) des RGW sprechen. Das bedeutet aber selbstredend nicht, daß es in dem Wirkungskreis der einzelnen RGW-Organe *objektiverseits* keine Unterschiede geben würde. Die Bestimmung der einzelnen RGW-Organe, der Bereich ihrer Aufgaben und Funktionen ist prinzipiell auch für ihre Rechtskreise und Wirkungsbereiche in objektivem Sinne bestimmend. Der Inhalt derselben ist im Grunddokument des RGW und in anderen normativen Dokumenten (Geschäftsordnung der einzelnen Organe) niedergelegt.

Das höchste Organ des RGW ist die *Sitzungsperiode des Rates*. Aus diesem Status der Sitzungsperiode folgt es, daß sie berechtigt ist alle Fragen zu besprechen und entsprechende Entscheidungen zu treffen, die in den Wirkungsbereich des RGW, als internationale Organisation gehört. Mit Hinsicht darauf, daß der Wirkungskreis der Sitzungsperiode objektiverseits, unter den durch das Grunddokument bestimmten Rahmen, prinzipiell unbeschränkt ist, könnte man sagen, daß dieser Wirkungskreis *allgemein* ist.

Zwar ist die Sitzungsperiode berechtigt in sämtlichen in ihren Wirkungskreis gehörenden Fragen Entscheidungen zu treffen, das bedeutet aber selbstverständlich nicht, daß in sämtlichen Kooperationsfragen die Sitzungsperiode entscheidet.

Unter den RGW-Organen ist ihrer Bestimmung, Aufgaben und Funktionen nach eine bestimmte Arbeitsteilung geltend, die auch dem Inhalt ihres objektiven Wirkungskreise nach bestimmend ist. Gleichzeitig gibt es aber Fragen, bei denen nur die Sitzungsperiode zu entscheiden befugt ist, das heißt, die in den *ausschließlichen* Wirkungskreis der Sitzungsperiode gehören. Diese Fragen sind ihrem Charakter nach solche, die die wichtigsten, die bedeutendsten Bezüge der wirtschaftlichen und wissenschaftlich-technischen Kooperation zwischen den Mitgliedstaaten, beziehungsweise die wichtigsten Fragen der Organisation und der Funktion des RGW berühren. Solche Fragen sind zum Beispiel:

(a) Die Bestimmung der Funktionierungstendenz des RGW, die Annahme des langfristigen Programms der Kooperation (z. B. Komplexprogramm, beziehungsweise die Annahme der langfristigen Kooperations-Zielprogramme),

(b) Aufnahme von neuen Mitgliedern in den RGW,

(c) Die Annahme der Modifizierung des Grunddokuments des RGW,

(d) Entscheidung über die Aufstellung der Kooperationsausschüsse und ständigen Kommissionen des RGW,

(e) Ernennung des Sekretärs des RGW, usw.

Das oberste *Exekutivorgan* des RGW ist der *Exekutivkomitee* des RGW. In den Wirkungskreis des Exekutivkomitees gehören die folgenden wichtigeren Fragen:

(a) Die Lenkung der Realisierung der bevorstehenden Kooperationsaufgaben, die Verfolgung der Durchführung der Verpflichtungen, die aus der Annahme der Empfehlungen durch die Mitgliedstaaten herrühren,

(b) die Koordinierungsarbeit der Pläne, die Lenkung der Spezialisierung und der Kooperation, die Organisierung der Ausarbeitung der Grundtendenzen der Arbeitsteilung,

(c) Die Ausarbeitung des Warenaustauschverkehrs und der wechselseitigen Leistungen zwischen den Mitgliedstaaten, beziehungsweise die Ausarbeitung der Hauptrichtungen der wissenschaftlich-technischen Kooperation,

(d) die Lenkung der Arbeit der Kooperationsausschüsse, der ständigen Kommissionen und des Sekretariats des RGW,

(e) die Bestätigung des Budgets des Rates, beziehungsweise des Budgetreferats, sowie des Personalstandes des Sekretariats, usw.

Aufgrund des Bereiches und der Natur der der Kompetenz des Exekutivkomitees zugewiesenen Fragen kann festgestellt werden, daß sein Wirkungskreis, seine Inhaltselemente in objektivem Sinn betrachtet gleicherart *allgemein* sind.

Es muß ferner aufmerksam gemacht werden, daß es Fragen gibt, bei denen die Entscheidung durch das Grunddokument des RGW und sonstige, normative Dokumente ausdrücklich der Kompetenz des Exekutivkomitees zugewiesen sind.

Solche Fragen sind zum Beispiel die Ernennung der stellvertretenden Sekretäre des RGW, die Bestätigung der Kooperationsordnung des RGW, sowie der Geschäftsordnung der ständigen Kommissionen, zur Kontrolle der finanziellen Tätigkeit des RGW Aufstellung entsprechender Organe, usw.

Die Hauptaufgabe der *Kooperationsausschüsse* ist die komplexe Untersuchung der wichtigsten Fragen ihres Betätigungsfeldes, beziehungsweise, im Rahmen der gegebenen Funktion, der wirtschaftlichen und wissenschaftlich-technischen Kooperation, und die vielseitige Lösung derselben. Der Wirkungskreis der Kooperationsausschüsse umfaßt in objektivem Sinn die Fragen der Kooperation auf dem Gebiet der Planung und der wissenschaftlich-technischen, bzw. materiell-technischen Versorgung.

Die im Rahmen des RGW funktionierenden *ständigen Kommissionen* haben die Entwicklung der vielseitigen wirtschaftlichen Beziehungen im Rahmen der volkswirtschaftlichen Funktion, bzw. in einzelnen Zweigen der Volkswirtschaft, und die Organisierung der wirtschaftlichen und wissenschaftlich-technischen Kooperation zur Aufgabe. Demzufolge ist auch der Inhalt ihres objektiven Wirkungskreises durch die Rahmen des gegebenen Zweiges, bzw. der gegebenen Funktion begrenzt. In diesem Sinn hat auch der objektive Inhalt des Wirkungskreises dieser Organe einen *speziellen* Charakter.

Die genannten Organe (Sitzungsperiode des Rates, das Exekutivkomitee, die Kooperationsausschüsse und die ständigen Kommissionen) sind die sogenannten grundlegenden Vertretungsorgane des RGW. Das bedeutet unter anderen, daß all jene *Entscheidungsbefugnisse*, mit denen das Grunddokument (Art. IV) den Rat ausgestattet hat, in den Wirkungskreis dieser Organe in originalem und nicht objektivem Sinn des Wortes gehören. Diese Befugnisse sind das Recht der Fassung von *Empfehlungen* an die Mitgliedstaaten, sowie das recht der Beschlußfassung.

Neben den erwähnten grundlegenden Vertretungsorganen des RGW funktionieren auch andere Organe mit *Vertretungscharakter*. Solche Organe sind die *ständigen Konferenzen* des RGW (z. B. die juristische Konferenz, Konferenz der Leiter der Preisämter, Konferenz der Ministere des Binnenhandels, usw.). Das Hauptunterscheidungsmerkmal des Wirkungskreises dieser Organe in Bezug auf die Entscheidungen ist, daß sie über *kein* Empfehlungsrecht verfügen. Wenn sie in einer Kooperationsfrage eine Entscheidung für nötig halten, legen sie dem Exekutivkomitee des RGW oder einem anderen über Empfehlungsrecht verfügenden grundlegenden Vertretungsorgan einen entsprechenden Vorschlag vor. Gleichzeitig aber sind sie befugt — und das ist auch eine gewisse Eigenheit ihres Rechtsstatus und demzufolge auch ihres Wirkungskreises — in den in ihren Aufgabenkreis gehörenden Kooperationsfragen vorangehend erwähnte *abgestimmte Vorschläge* anzunehmen. Das Beschlußfassungsrecht steht natürlich auch den ständigen Kommissionen zu.

Abschließend soll noch erwähnt werden, daß von dem vorhin erwähnten Entscheidungsrecht, wie die *unmittelbare Vereinbarung*, in jedem beliebigen Organ des RGW Gebrauch gemacht werden kann, wenn die Mitgliedstaaten in der gegebenen Frage in dieser Form entscheiden wollen und dazu die Vertreter der Mitgliedstaaten im konkreten Fall entsprechende Ermächtigung haben.

Международная институционная система интеграции СЭВ

Л. Фицере

В статье изучены некоторые организационные и правовые отношения международной институционной системы интеграции СЭВ. Автор исходит из того, что рассматривая институционную систему интеграции необходимо иметь в виду, что интеграция осуществляется на уровне государств равно как и предприятий, и государство принимает участие в процессе интеграции не только в качестве суверена, но и собственника.

Первая часть статьи посвящена тенденциям развития и понятийной категории международной институционной системы интеграции СЭВ. Автор подчеркивает, что в развитии институционной системы интеграции намечается *две* тенденции: количественный рост институционной системы, процесс ее внутренней дифференциации с одной стороны, и обеспечение эффективного действия сложившейся системы, внутреннего интегрирования дифференцированной организационной структуры, с другой стороны. Рассматривая понятие институционной системы автор приходит к выводу, что о понятии институционной системы можно говорить в *узком* и *широком* смысле. В узком смысле международная институционная система охватывает только межгосударственные (двух- и многосторонние) организации, а в широком смысле слова она включает в себя и совместные организации, действующие на уровне предприятий.

Во второй части статьи рассматриваются правовые средства системы *внутренних связей* международного институционного механизма и в рамках этого — взаимоотношение СЭВ как базового органа институционной системы интеграции с *межгосударственными организациями, функционирующими в отдельных областях сотрудничества*, а также с *международными хозяйственными организациями* (международными товариществами, совместными предприятиями) в ходе их деятельности, далее рассматриваются средства и методы координации их деятельности. Автор выводит заключение, что единое функционирование международной институционной системы в конечном счете определяется совместно разработанной системой целей интеграции, которая была

сформулирована в долгосрочной программе сотрудничества. В то же время в рамках институционной системы отдельные организации сотрудничества *самостоятельно* функционируют в кругу обязанностей, предусмотренных в их учредительских документах. Это не исключает, а наоборот, предполагает соответствующую координацию деятельности совместных организаций, которую и организационно-правовые средства (протоколы о сотрудничестве) призваны обеспечить.

В третьей части статьи автор рассматривает функционирование институционной системы в свете *порядка принятия решений СЭВ*. Автор изучает правовые признаки и отличительные специфики *решения СЭВ, рекомендации СЭВ, согласованного предложения* и *непосредственного соглашения*. В рамках этого автор подвергает детальному изучению взаимосвязи рекомендации СЭВ и международных договоров и приходит к заключению, что рекомендация СЭВ представляет собой самостоятельный, своеобразный международно-правовой акт, который — сопоставляя с международным договором — проявляет ряд специфических черт. Наконец автор рассматривает содержательные элементы компетенции отдельных органов СЭВ в вещественном смысле слова.

The international institutional system of CMEA

L. FICZERE

The paper analyzes some organizational and legal aspects of the international institutional system of CMEA integration. It starts from the point that surveying the institutional system of integration it should be considered that the integration goes on both at state and enterprise level and the state participates in the process not only as sovereign power, but as proprietor, too. The first part of the paper deals with the development trends and terminological sphere of the international institutional system of CMEA integration. It emphasizes that *two* tendencies could be surveyed in the development of the institutional system of the integration: the quantitative increase of the institutional system, the process of inner differentiation, respectively the consolidation of the inner integration of the differentiated organisational structure. Analyzing the terminological sphere of the institutional system it takes the conclusion that we may talk about the term of institutional system in a *narrower* and a *wider* meaning. In its narrower meaning the international institutional system included only the inter-state (bilateral and multilateral) organizations, in wider meaning it includes the common organizations at enterprise (institute) level, too.

The second part of the paper deals with the legal means of the *inner connection system* of the international institutional mechanism, including the connection between the CMEA as central basic organization of the institutional system of integration and the various *inter-state organizations* operating on different spheres of co-operation, and the CMEA and the *international economic organizations* (international associations, joint ventures), the means of coordination of their activities and their methods. It draws the conclusion that the universal direction of the operation of the international institutional system is determined ultimately by the commonly established system of purposes in the integration. In the same time, within the institutional system the various co-operating organs *independently* operate in the sphere determined by their charters. This fact does not exclude, moreover, it requires the appropriate coordination of the operation of the common organs. This coordination is promoted by organizational-legal means too (coordination protocols).

The third part of the paper surveys the operation of the institutional mechanism in the cross-section of the *decision-making system of CMEA*. It deals with the legal features and differentiating characteristics of CMEA *resolutions*, CMEA *recommendations*, *collated proposals* and *direct agreements*. Within this subject it goes in details analyzing the relation between the CMEA recommendation and the international agreements and draws the conclusion that the CMEA recommendation is an independent, special legal act, which shows some specific features compared to the international agreement. Finally, it surveys the content elements of the sphere of authority of each CMEA organs in their objective meaning.

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Civil law problems of the specialization of production and of the co-operation in production in the framework of CMEA

I. VÖRÖS
research officer
Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences

"The wide-ranging development of international specialization of production is the most important problem of socialist economic integration." "The socialist international co-operation results in more profound relations of integration than any other form of economic co-operation".
(Kormnov)

The paper investigates the place and role of the institution of "international specialization of production as well as of the co-operation" in the economic and legal mechanism of CMEA and comes to the conclusion that the present "specialization of production and co-operation" covers in the reality a pure specialization. The co-operation and its contractual form shall be strictly delimited therefrom; the co-operation contract has an essentially different role in the integration. Although the development of the contract of international co-operation in production comes up against significant difficulties, the author of the paper believes that the economy—both the socialist economic integration and the beginning of a new era in the world economy—requires the development of legal relationships of co-operation type. The elaboration of the international co-operation contract of production would mean an important step on this way.

1. The socialist economic integration scarcely has such an institution—except perhaps for the commodity and financial relations—which has been realized as much differently from those conceived and written about it than the specialization of production and the co-operation. The fact is that the notion itself is somehow inadequate. This institution namely has been spoken and written about and decided upon just from the beginning in such a way: the two words connected with "and", and this duality has remained up to now, it has become a matter of common economic and legal knowledge and there—in spite of the propagation of differentiated approaches laying stress on the precise definition and the delimitation of the two notions—keeps stubbornly its ground.

Of course, both the uniform and the differentiated treatment have certainly their own *reasons*. The traditions of decades have displayed their effect which—especially in

the jurisprudence—are able to survive sometimes with surprising obstinacy; presumably this fact played also a role in that that the Legal Conference of CMEA was charged with the elaboration of the system of legal conditions of the specialization of production *and* of the co-operation, and especially, however, in that that also the finally elaborated and already enacted legal document: the General Conditions of the Specialization of Production and of the Co-operation (promulgated in Hungary by the Law-Decree No. 24 of 1979) seems to regulate both institutions (or as one institution?). It is not contestable either that the matter is not only the process of theoretical purification behind the use of word "and" or the differentiation also severe divergences of opinions—relating to the nature and the maintenance of socialist economic integration, to the place taken and to the role played therein by the specialization and co-operation—may be concealed.[1]

The non-unanimity of the situation caused by the terminologies used consciously or less intentionally is obviously embarrassing. As a consequence thereof namely at least *three* problems come up. The first is that it impedes the revelation of the duality of the pair of concepts, of the particular contents—giving the impression of a category "to be settled" uniformly. Secondly: The terminology of the "General Conditions of the Specialization of Production and of the Co-operation" gives the impression as if both or a uniform institution(s) would be successfully regulated and thereby it entertains the possible belief in the field of legal investigations that by means of this significant uniform norm the legal alternatives to be offered for promoting the specialization *and* co-operation processes would be adequately covered. Finally, a question being in our opinion highly—if not the most—significant remains obscure what a role *may have* one institution and what the other in the economic mechanism of socialist economic integration; that due to their particularities, what part to fill is *suitable* one and the other, finally, to the performance of which function the requirements of the given period of the integration lay social-economic-political and legal *claims* on the level of the community of socialist countries.

2. All these questions shall be, however, faced when the possibilities in principle of the further development of this field of the socialist economic integration are seeked taking into consideration the possible demands. We are of the opinion that there is no reason to rest: the covered way should be examined just in the light of the above questions; its appreciation is possible also depending on the answering of these questions.

[1] As for the conceptional differences, see in the legal literature e.g. the conception of the uniform process of the specialization and co-operation governed "centrally" by the states (we will come back to that later): *Das System rechtlicher Regelung der sozialistischen ökonomischen Integration*, Berlin, 1975. Chapter 5.: *Die rechtliche Regelung der Spezialisierung und Kooperation der Produktion*, or HUTSCHENREUTER, H.: *Regierungsabkommen und Ministervereinbarungen im System vertraglicher Rechtsformen der internationaler Spezialisierung und Kooperation der Produktion im Bereich des RGW*, Staat und Recht, 6/1979.; the same author: *Entwicklungslinien auf dem Gebiet der Spezialisierungs- und Kooperationsverträge zwischen Wirtschaftsorganisationen der RGW-Länder*, Staat und Recht, 1/1980.

I.
The place of the specialization of production and of co-operation in the history of development of the socialist economic integration

3. It is well-known that in the 10–15 years following the Second World War the striving after autarchy and universalism became predominant in the economic policy of socialist countries under the effect of outer and inner conditions. Also the mechanical acceptance of the earlier experiences of Soviet industrialization contributed thereto. Consequently, parallel production capacities were established one after the other, which, however, developed quite isolatedly from each other with respect to the technology.

The end of the period of autarchy may be estimated to be in 1956: in the decision of the 7th session of CMEA the recognition is already reflected that the *co-ordination and division of production programs* of the member-countries shall be set as target. The *legal mechanism* of the new phase based partly on the system of recommendations which laid down with binding force the objects and the time limits for their achievement, whereas the member-countries were entrusted with the measures to be taken. On the other hand, the intention of specialization-co-operation materialized in the recommendations was realized through the traditional foreign-trade channels.

4. The claim to the switch over to the intensive developing phase came up at the beginning or in the middle of the sixties: at this time, the elimination of unjustified parallelisms came expressly into prominence, the fundamental instrument of which was held to be the specialization of production and the co-operation. The increase of importance of this institutions is signified by the documents accepted in the sixties. The 13th session in 1960 proposed to the states only to conclude agreements for realizing the recommendations for specialization which expressed the requirement to go beyond the traditional foreign-trade means. The document entitled "Fundamental principles of socialist international labour division" elaborated in the 15th session and adopted in 1962 offered already the *concept* of the international specialization of production and of the co-operation. Accordingly, the question is the *concentration of the manufacture of products of the same sort* in one or some socialist countries, the purpose of which is the satisfaction of needs of the interested countries, whereas its means are the elevation of the technical and organizational level of the production, as well as the development of *continuous interstate economic relationships,* of the *co-operation in production.*[2] (This definition of the concept had a great effect on the theory, too.)[3]

[2] *Legal Documents of the Council of Mutual Economic Aid,* Budapest, 1978. pp. 42–43.

[3] It is referred to and cited in several papers, e.g. Гринголь, И. А. (Gringolz): *О договорных формах специализации и кооперирования производства между странами-членами СЭВ,* Uchonye Zapiski. Vipusk 27, Moscow, 1972, p. 92.; Кормнов, Ю. Ф. (Kormnov): *Специализация и кооперация производство стран СЭВ,* Moscow, 1972. Chapter I.; Pécsi, K.: *A KGST termelési integráció közgazdasági kérdései* (Economic questions of the integration of production in CMEA), Budapest, 1977. p. 43.

Subsequently, the document under the title "Effective measures for the improvement of the work in the field of the specialization of production and of the co-operation, especially in the preparation, development and realization of the specialization of production and of the co-operation" approved by the session of the Executive Committee on May 29, 1967, stressed among others the significance of legal means, emphasizing the importance of laying down in *agreement the rights and obligations* of the participating *states*.

5. The Complex Program (1971) outlined an integration model in which the process of integration is essentially consciously-purposefully controlled by the state and in which, at the same time, the extension and consolidation of commodity and financial conditions, as well as those of the international markets of the member-countries are of great importance.[4] The basis of the integration model was the necessity of the switch over to the intensive development, its antecedents were constituted by the fact that in the early sixties even the pace of development of the economies and the trade of the member-countries with each other diminished.[5] Therefore, the claim was raised that the subject of co-operation should be not exclusively the integration of unvariedly separated production capacities through the macro-level organization of foreign-trade relations.

In the centre of the Complex Program fell the *production process as a whole*, as the totality of creative phases. This circumstance laid new claim towards the economic mechanism of integration: it was to provide for the performance of the *structural* as well as the technical tasks of integration.[6]

It was the harmonized structure-policy of the member-countries, directed towards the development of some mutually defined international economic structure which came into the limelight—if not to the very centre—of the new international economic-political conception formulated by the Complex Program.[7]

The integration *mechanism* outlined by the Complex Program is generally described as the ensemble of three elements being in organic relation. They are: co-operation in planning, commodity-money relations, as well as the organizational-institutional-legal forms. It was obvious from the very first that in the realization of the co-ordinated international structure policy the decisive role will be played by the fundamental planning co-operation. At the same time, it became also evident that the results of the co-ordination in planning of this structure policy will be transformed into the practice fundamentally by the specialization of production and by the co-operation belonging to the range of the third element of the mechanism. It is scarcely a mere

[4] Cf. *Legal Documents of CMEA*, p. 61.

[5] Kiss, T.: *Hol tart a KGST integráció?* (Where is the integration of CMEA got to?), Budapest, 1972. p. 45.

[6] Ширяев, Й. С. (Shiryayev): *Экономический механизм социалистической интеграции*, Moscow, 1973, Chapter II.

[7] Shiryayev: ibid. Chapter III.; the same author: *Международное социалистическое разделение труда*, Moscow, 1977. Chapter II.

chance that the Complex Program (Chapter 4, paras 20.2 and 26.5) mentioned on the second place among the subjects of the co-ordination of planning the specialization of production and the co-operation. Therefore, the state-controlled specialization and co-operation follow logically from the planning co-operation, the close—conceptional—connection, *relation* of the two institutions is obvious.[8]

It is beyond doubt that the demand on the *rationalization* of the branches of industry[9] follows from the internal logic of the objects and the economic mechanism of the Complex Program. The fact, however, that the specialization and the co-operation were realized with a one-sidedness preferring the planning co-ordination, may be explained by the particularities of the development of integration, by the upshots of the period elapsed since the Complex Program, by the effective realization of the Program.

At that time, *Kormnov* underlined among others the *interaction* between the specialization and co-operation on one side and the planning co-ordination on the other, emphasizing that at the same time the specialization and co-operation themselves furnish suitable basis for the planning co-ordination.[10] It is a fact that the Complex Program not only started in those days from the combination of inter-state agreements and contracts of economic organizations but also abstained to assume some hierarchic relation between them (Chapter 6, para 7). It outlined such a conception of specialization and co-operation (Chapter 10, paras 4, 5) in which the *character* of the institution was supplied through the connection with the planning co-ordination by a *significant inter-state attraction,* and simultaneously by the *reliance upon the intensive initiative of enterprises.*

6. It is widely known that the above economic-political conception and the corresponding mechanism was realized not quite according to the original ideas. *Mádl* expected in 1969 a historical change of era, the exceeding of the conception of extensive centralized development of economy. The enumeration of phenomena rendering necessary the change, however, shows—despite the considerable results—that they are still far from being completely solved. The economic literature has mentioned repeatedly even since the essential survival of the parallel production structure, the separation of production, the different interests in foreign trade, the naturalization of exchange and—due to the lack of convertible currency—the associated bilateralism, the endeavour for mutual balance, in general the overshadowing and deformation of economic categories, as well as the prices being unable to give orientation in respect of efficiency (since they show exclusively the exchange ratio) that, taking all those into

[8] Cf. *Complex Program,* Chapter 6, para 7, as well as CSABA, L.: *A KGST integráció gazdasági mechanizmusának időszerű problémái* (Actual problems of the economic mechanism of integration in CMEA), Jogtudományi Közlöny, 11/1980.

[9] KORMNOV, op. cit. Chapter V. The significance of the specialization of production and of the co-operation is also proved by that that the report on the Session No. XXXIV of June 1980 mentions it as the most important trend in the intensification of efficiency of the co-operation.

[10] KORMNOV: ibid.

consideration, no effective commodity motion exists, the lack of direct relations of enterprises, etc.[11]

The overshadowing of the commodity and financial conditions, as a matter of course, increased the significance of the other mechanism-column: of the planning co-operation. All these resulted logically in the predominance of the inter-state macro-sphere[12], and in the negliging of the micro-sphere and in connection therewith, that of the aspects of efficacity and economicalness. All these together determine the basic particularities of the mechanism, namely that it does not exceed even today the frames of an extensive *integration referring to the sphere exclusively of the production* (and not of the turnover), and essentially corresponds to the type of centralized economic mechanism of *plan-reduction before* the economic reforms.[13] The conception relating to the economic mechanism of the Complex Program was preceded by the centralized management systems of plan-reduction of the fifties, and followed by the recentralizing processes of the seventies; thereby the present situation may be explained in many respects. The relation of the international mechanism to the internal management systems—moreover, its being determined by them—is namely well known.[14] The fundamental consistency[15] with respect to the majority of the internal management systems means thus an inconsistency with respect to the Complex Program.

7. The fate of this mechanism was *shared* by the international *specialization of production and co-operation*, too. The demand on the rationalization of the production programs according to industrial branches emerged from the above notion of the planning aspect, from the internal logic of the conception as a whole. The restructurizing international economic-political attitude, the planning co-operation aiming at the definition and delimitation of production profils of the sectors of national

[11] MÁDL, F.: *A gazdasági integráció jogi struktúrája felé* (Towards the legal structure of the economic integration), Állam- és Jogtudomány, 1969, pp. 266–269; for a comprehensive analysis of the international mechanism cf. CSABA, op. cit. as well as PÉCSI, op. cit. pp. 32. et seq.; KISS, op. cit. pp. 46–68; BOTOS, K.: *Külgazdasági koncepció — nemzetközi kooperáció* (Foreign economic conception — international co-operation), Közgazdasági Szemle, 11/1979.

[12] SHIRYAYEV—who warns against whatever decentralization of the management of co-operation in production (thus of the process of specialization and co-operation)—outlines himself that "only the possibilities presenting themselves on the national economic level of the international co-operation are utilized". (op. cit. n. 6. Chapter III.); cf. also PÉCSI, op. cit. p. 31.

[13] PÉCSI: op. cit.; CSABA: op. cit.

[14] KORMNOV: *A nemzetközi termelési szakosítás és kooperáció problémái a KGST-tagországokban* (Problems of the international specialization and co-operation of production in the member-countries of CMEA). p. 118. in: *A szocialista integráció fejlesztésének elméleti és gyakorlati kérdései* (Theoretical and practical questions of the development of socialist integration), Budapest, 1978. p. 118.; SHIRYAYEV, Chapter III.

[15] PÉCSI, op. cit. p. 57.; by the essential consistency reference is made to a fact and not to a requirement; the dissimilarities of internal mechanisms to each other and to the international mechanism have objective reasons: SHIRYAYEV: op. cit. (n. 7.) Chapter II.; as for the dissimilarities, cf. e.g. FÖLDES, K.: *Nemzetgazdaságok a szocialista együttműködés rendszerében* (National economies in the system of socialist co-operation), Közgazdasági Szemle, 11/1979.

economy produced at the same time an element in the organizational-legal mechanism. As organizational element we refer here to a conception accepted by the majority of the present mechanisms after the economic reforms—the large intermediate governing organizations, vertical manufacturing plants—which realize the state planning decisions and for the sake thereof, have both managing function and powers. Certainly, in the international mechanism, simple international intermediate governing organs cannot be established: the socialist economic integration is the economic co-operation of sovereign socialist states, the definition of special lines of industrial branches belongs to the rights of the individual states,[16] where the organization and management of the economy flows lastly through national state management channels to the economic organizations. The appropriate means for the "flowing down" of the decisions on planning co-operation were ready found by the protectors of integration: the *inter-state* agreements on specialization and co-operation. According to the present practice, these agreements transform the results of planning co-operation *into "target-like" bilateral obligations,* whereas the participating states ensure the enforcement of the inter-state agreements according to their internal management system. The end point of the enforcement is the contract of economic organizations on the specialization of production and on co-operation transforming the bilateral consent into a *civil law* obligation. The contents of this contract are, however, *nearly completely* defined by the inter-state agreement placed on the medium level. The contract has therefore an importance not in the establishment of the relation of specialization and co-operation but rather in the *performance,* execution, in the provision for the fulfilment thereof; it "puts" rather the "point" onto the letter "i" of the decision on state-level, it means the sanction, the enforceability thereof.—As for its legal nature, it is close mainly to the former plan-contracts.

II.
Nature and legal particularities of specialization and co-operation

8. The *nature* of specialization and co-operation is determined as follows, taking into consideration the afore-mentioned.

a) Instrument of the *restructurizing* of national-economic *sectors* on CMEA level; its function is the definition, the "division" of *profiles* as a result of international understanding.

b) The object and the function attract unambiguously the *inter-state* character together with its economic and legal consequences. In the practice there is nearly always some planning co-operation act serving as the basis of the relation of specialization and co-operation (CMEA recommendation, decisions of the bilateral

[16] KORMNOV, op. cit. (n. 3.)

scientific-technical co-operation committees, bilateral intergovernmental agreements on the specialization of production and co-operation).[17]

c) In the centre of the specialization and co-operation it is to be found not a product but one of the branches of the national economy, mostly that of the industry, the specialized production of large volume performed herein, its object is some larger project (e.g. in Hungary the co-operation in highroad vehicle industry, co-operation in aluminium industry and the olefin co-operation).

d) Since the intention is the reduction to the greatest possible extent of the parallel production structures, the co-operation aims not at the interconnection of productions of similar profile but just at the *separation* thereof through the development of "pure" profiles. The separation relates similarly to national economies, industrial branches as well as to enterprises. The direct consequence of separation is the *uni-directional* character of the relation of specialization: one party—specialized to the production—only produces and delivers, the other party—so-called "not-specialized" to the production—only takes over. The matter is here not a real co-operation of production or realization, since the result of the separated production is forwarded through the traditional foreign-trade channels to the not-specialized party meeting its demands.

e) The *end-product* oriented character of specialization and co-operation understandingly follows from the separating character.

f) To the above characteristics of specialization and co-operation corresponds legally the two-level nature as main rule: the international inter-state agreement is followed by the civil-law contract concluded by the economic organizations. The essence of the "labour division" between the two levels, realized in the practice—somewhat simplifying the question for the sake of a more clear exposition—consists in that that the decision on *specialization* relating to the labour division is passed on *inter-state* level; the main feature of this agreement is the *production organizing* character, the preparation of the barter relations.[18] On the other hand, the essence of the civil-law contracts is a *pactum de contrahendo* i.e. obligation undertaken for the conclusion of subsequent foreign-trade contracts. In this legal relationship—although the contracts

[17] Though KORMNOV writes about the productive activity of enterprises chosen especially for this purpose, the emphasis on choice, however, excludes by itself any doubt [op. cit. (n. 14.) p. 91.]. As for the co-operation in planning, neither the Complex Program, nor the practice of the integration in CMEA know the institution of cooperation in planning on enterprise level, although in principle the possibility thereof cannot be excluded.

[18] KORMNOV, p. 91; though BOGUSLAVSKY divides the rights and the obligations of the parties into two groups: those relating to the preparation and organization of production, as well as to the exchange of goods [Богуславский, М. М. (BOGUSLAVSKY): *Правовое регулирование международных экономических связей*, Moscow, 1970. pp. 15–19.] but GRINGOLZ (op. cit.) criticizes it, pointing out that the exchange of goods is performed on the strength of contracts formed especially for this purpose—in the contracts on specialization and co-operation the parties undertake only to conclude such contracts; HUTSCHENREUTER, H.: *Die Entwicklung des Vertragssystems auf dem Gebiet der internationalen Produktionsspezialisierung und -kooperation* (ISPK). Report on the conference (February, 1980) organized in Moscow by the International Institute dealing with the economic problems of socialist world system of CMEA, (MS) p. 5.

do contain production obligations to the charge of the specializing party—the clause relating to specialization and production organization has no significance since if the party does not produce he will violate at any rate the *pactum de contrahendo*. This latter obligation—one of the main ones—thus practically absorbs from a legal point of view the obligation of production which is considered to be the other main obligation of the specializing party. As for the long-range foreign-trade general contract of delivery, included in many contracts, however, this is not the essence of the contract on specialization and co-operation but the consequence of the *pactum de contrahendo*, so to say the definition of the subject of the *pactum*.

The *pactum de contrahendo*, therefore, prepares not the production but the exchange of goods: it is of *barter-organizing* character. This character corresponds to the claims set up by the place and role of the specialization and co-operation in the economic mechanism, i.e. it is conform to the characteristic features—being relevant in civil-law respect—having been outlined above (uni-directional relation, separating character). The relation of the pact to the exchange of goods, the fact that if does not exceed the limits of barter taken in broad sense, reflects the role which the integration mechanism foresees for the economic organizations: the contracting parties of the civil-law contract. The relation of the parties *does not go beyond* the exchange of goods organized for a long range—considering the essence of the matter; that, however, does not alter the fact that the parties—as for their positions—are located on the *opposite poles* of the commodity relations. To the *clash of interests* characterizing thereby their relation the pact gives the required—and adequate—legal answer.

III.
Results, problems

9. The results and (at the same time) advantages of the inter-state projects of specialization and co-operation (reduction of parallel production, optimum production volume, market having an absorbing capacity for a long time) are well-known as much as their enumeration is superfluous. We refer only to the fact that without these programs, several sectors (primarily industrial branches) and several product groups of the Hungarian national economy could not have been developed at all since without the enormous market provided for by the CMEA we would not have even the possibility thereof. The question is not, therefore, whether the participation in such a specialization activity should be considered useful but it is, how it could be made *better*—also for the benefit of the entire integration community.

10. For this purpose, however, primarily the *problems of the functioning and the practice* of specialization and co-operation shall be revealed. In the following some phenomena giving food for thought will be briefly referred to:

a) the inter-state decisions relating to the rationalization were not always justified by a successful specialization;

b) the continuance of *parallelisms* still causes troubles in spite of decisions on specialization;

c) the decisions on specialization tend primarily to the satisfaction of demands of the particular countries, and from the *exclusive state interest* resulting therefrom directly follows the subordinate role of economic considerations; the decision on specialization frequently contains *not the most efficient variant;*

d) due to the lack of financial interest on enterprise level and because of the specialization is having an attitude directed to the end product a *monopolistic position* is frequently ensured for the specializing party, and thus the negliging of the technical development and the *deterioration of quality* are common phenomena. (The reason is obvious: for want of stimulation and interest, the market demands do not influence at all or influence only to an insignificant extent the activity of the enterprises; the single motive is—somewhat simplified—to fulfil the "task set by the plan" contained in the inter-state agreement, which is "translated" by the contract of specialization and co-operation into the language of the civil law);

e) the gravest problem caused by the almost exclusive rule of the end-product attitude, is the practically complete *lack* of specialization according to *components—unit parts,* as well as to the phases of technological process.[19] *Shiryayev* and *Pécsi* consider the conception prevailing in the last decades, relating to the precise division of programs of the manufacture of end products—and thereby the entire conception serving as basis for the specialization practice—*one-sided;*[20] in our opinion, well-founded.

11. The pact mentioned above is thus the adequate legal expression of the economic conception serving for its basis, and even more so of the effectively realized specialization practice; the working group dealing with the elaboration of the General Conditions of the Specialization of Production and of the Co-operation performed successfully its task within the framework of its assignment. At the same time, it is a fact that this pact is suitable essentially for seizing the position resulting from the opposite market and commodity relations; it is not only unsuitable for expressing the elements of joint interests but this is not at all its function. Moreover: the construction practically *suppresses* the elements of the possible community of economic interests and forces the parties to the opposite poles of the commodity relations—if they were not already standing completely there (which can be proved by several practical

[19] KORMNOV raised objections against it early in the seventies op. cit. (n. 3.) Chapter I. but he finds the same at the end of the seventies as well as PÉCSI. KORMNOV, op. cit. (n. 14.) p. 93.; PÉCSI, op. cit. pp. 83–85. This fact is referred to also by the very high share of the turnover of machines and equipment in the trade within the CMEA (BOTOS, op. cit.) which not only did not become the fundament of an export counterattack on the world market but—on the contrary!—has lead to a considerable advance in the capitalist import of components (this fact, however, contributed to the intensification of balance problems of foreign trade in several member-countries—ibid.

[20] PÉCSI, op. cit. p. 112.; SHIRYAYEV, op. cit. (n. 6.) Chapter II.; the same author, op. cit. (n. 7.) Chapter I.

examples).[21] This pact "reduces" and accomplishes the "target" undertaken by the state correctly and efficiently. The mechanism confirmed by the pact and by the severe sanction system contained in the General Conditions on the Specialization of Production and of the Co-operation leads to a system logically closed. At the same time, this system leads to problems in economic efficiency and quality, on the one hand, and to sometimes strained legal relationship of the partners, on the other, contrary to the legal intention.

It should be noted, however, that some elements of the former conception favouring exclusively the interstate legal level still appear in the General Conditions on the Specialization of Production and of the Co-operation. At the same time, the General Conditions shall be applied only for contracts formed after the coming into effect of the General Conditions; therefore, the contracts concluded earlier and prolongated in 1980 were not redrafted. The General Conditions—as proved by *Bauer* and *Sábicz—do not make feel their effect* in the contractual practice;[22] the contents of the contracts are featuring in several respect a character of international and constitutional law, in spite of having been signed by the enterprises. It is a practical problem that due to the new price principle the price situation became completely unstable, and so—for the lack of a real sliding price clause—the pact contained in the specialization contract does not function even as a long-range contract of delivery. While it is obvious, on the one hand, that the legal institution of the pact is a correct legal alternative of the economic-political object of restructurization of inter-state and end-product attitude, it is indisputable, too, on the other hand, that by a possible elimination of the above-mentioned economic and legal problems the promotion of the specialization process by special legal means has still significant *reserves*.

[21] Two enterprises concluded a contract on specialization and co-operation on the strength of the appropriate inter-state decision, in which they agreed upon the division of production: one of them manufactures one part of the end product, the other, however, the other part thereof and the latter will assemble the end product. The former one delayed with the delivery, the other party, however, disregarded the enforcement of penalty with respect to the long-range relation. He did so in spite of the fact that in this way he himself was delayed with the delivery of the end product towards the foreign-trade company of the same country. This foreign-trade company, however, did not hesitate about the enforcement of penalty. It should be noted that traditional foreign-trade contracts are formed often even there where the connection of the parties—with respect to the effective specialization relation—could be rendered much closer as compared to the usual foreign trade contracts of delivery by means of specialization contract (SHIRYAYEV, op. cit. (n. 6.) Chapter II).

[22] BAUER, M.–SÁBICZ, I.: *Még egyszer a KGST-n belüli szakosítási szerződésekről* (Once more about the contracts on specialization within the CMEA), Jogtudományi Közlöny, 11/1981.

IV.
Prospects of specialization relations

12. In this respect, first of all the financial *interests* of the economic organizations should be developed considering the specialization process. This "rehabilitation" of the enterprise level certainly contradicts the exaggerated conception based on the today really predominant specialization practice which acknowledges only its exclusive state interests and administrative managing character. This conception may be briefly outlined as follows.

13. Its root is the economic consideration rendering the inter-state level absolutistic according to which the measures for specialization and co-operation are to be based exclusively on the international co-operation programs relating to the selected industrial branches. On the other hand, from the point of view of law, this conception applies the notion of socialist international economic law which combines the international law and civil law relations and in the centre of which stands the *common state management and planning* of the specialization and co-operation processes. According to this conception[23] the specialization and co-operation of production is considered to be the common state management and planning of the specialization process, the concrete results of which is an agreement of international law character. The agreement is the common management act of the states, the effect of which—according to the representatives of the discussed conception—is a direct establishing of an (obviously civil law) legal relationship between the economic organizations.[24] The inter-state agreement has therefore coordinating and organizing functions—let us add: like the intermediate governing syndicate in the majority of CMEA countries—and this common managing act regulates the relations of economic organizations. The inter-state agreement is distinguished from the civil law contracts by its managing character; the latters are confined to the regulation of economic activity.[25]

From this conception logically follows the *hierarchic relation* between the agreements concluded by governments, and ministries, respectively, on the one hand, and the civil law contracts of the economic organizations, on the other. This means the *pyramid* of legal obligations arising in this way, *the functional relation* and co-action of the contracts and agreements.[26]

[23] For the detailed exposition thereof cf. SEIFFERT, W.: *Der Systemcharakter der rechtlichen Regelung der sozialistischen ökonomischen Integration*, Staat und Recht, 11/1970.

[24] *Die rechtliche Regelung der Spezialisierung und Kooperation der Produktion*, (note 1.) pp. 205–210. This somewhat audacious declaration is damped—and rendered contradictory and obscure—by the contiguous remark according to which the constituted obligations are legally not directly binding: ibid. On the contrary: SZÁSZ, I.: *A KGST Általános Szállítási Feltételek* (The General Conditions of Delivery of CMEA), Budapest, 1974, pp. 190–193.

[25] Op. cit. pp. 211, 214.

[26] HUTSCHENREUTER: *Regierungsabkommen und Ministervereinbarungen im System vertraglicher Rechtsformen*, p. 513.; the same author: *Die Entwicklung des Vertragssystems*, p. 3.

The conception[27] supposes obviously a *much closer* planning co-operation than with the plan co-ordination. However,—as pointed out by *Kormnov* and *Shiryayev*—in the present phase of integration and also in the reasonable future, the idea of super-plans "above the states" is fully unfounded.[28] The unfoundedness follows primarily from the fact that the socialist economic integration is the voluntary co-operation of sovereign socialist countries. But it is also the consequence of that that more concretely, an inter-state agreement as some kind of "international managing act" cannot establish, either directly or indirectly, any obligatory legal relationship between the economic organizations by evading the states, the national economic management, because thereby the national state socialist property right above the production means would be infringed, too.

The concept of the specialization and co-operation process as a management pyramid infringes the exclusive national state economic management rights materializing in the state socialist property rights also from the *organizational aspect*. In the civil law contractual practice namely, the institution of "Council of Representatives" is often met, which is the forum of solving the problems arising in the course of the performance of contracts, its function is thereby the systematic co-ordination of the activities of the parties. In the conception of the management pyramid, however, the Council would grow over the parties: through it a connection is established between the parties of civil-law specialization contract and the various CMEA organs.

14. The lacking legal foundations of the conception of the management pyramid—in addition to those said above—could be pointed out by the fact that the General Conditions on the Specialization of Production and Co-operation—which express the *present communis opinio* of the member-countries of CMEA—do not know either the institution of the Council of Representatives or require that the specialization and co-operation contracts concluded by the economic organizations would have some "basis" materializing in any inter-state agreement. In the conception of the management pyramid the demand for some previous inter-state agreement is immanently concealed, its omission from the General Conditions, however, refers to the fact, on the one hand, that the member-countries take the level according to the Complex Program of the common state management of specialization process automatically for granted, but they do not want to hamstring the activity of the economic organizations *in statu nascendi*, on the other. Finally, the development of specialization processes being subject to the absolute condition of the planning method supposed by this conception would mean the dominance of the administrative-organizational aspect, to the prejudice of the economic aspect.[29]

[27] Which intends to project definite elements of economic mechanism and particular solutions into the international mechanism of socialist integration by obvious informality.

[28] KORMNOV, op. cit. (n. 3.); SHIRYAYEV calls the attention to the fact that the internationalization of productive forces did not yet rendered questionable the state-national organizational form of production (op. cit. n. 6.)

[29] KORMNOV, op. cit. (n. 3.)

As for the institutional aspect, it contradicts the basic civil law nature of the legal relationship, the principle of the co-ordinate position of the parties, but also the subordination of economic organizations exclusively to their national state economic management to establish an organ by means of the specialization contract, to which the members would submit themselves and which would fulfil a managing function. Moreover, this is also conceptually excluded: the subordinated economic organizations *cannot waive* in whatever civil law contract—even if based on inter-state agreement—the rights of the state economic management. Similarly contestable is the effect of constituting a legal relationship assigned to the inter-state agreement, which—reaching beyond its hierarchic attitude—underestimates the importance of the level of enterprise relations, although it deems in principle necessary the combination of the two levels.[30] Consequently, the conception of the management pyramid is supported *neither by the general line of socialist economic integration* either contained in the Complex Program, or effectively realized, nor *by the conception of the General Conditions on the Specialization of Production and Co-operation.* Moreover, the General Conditions—just disregarding the above-mentioned criteria—outlined *essentially a civil-law relationship* and let consciously open the possibility of the *autonomous activity on the level of the economic organizations.* The possibility of the development of this activity *on the strength of the main trend of specialization processes being directed through inter-state consent and within the framework thereof* follows certainly from the whole conception of the socialist economic integration, from its institutional system, without, however, the necessity of mixing for this purpose the inter-state level and the level of the economic organizations in the pyramid of international law and civil law obligations.

15. The specialization and co-operation contracts of the economic organizations may be in principle suitable, on the strength of the General Conditions on the Specialization of Production and Co-operation, for the realization of the *other* possibility offered by the *pactum de contrahendo*—mostly going beyond the character of executing the inter-state agreement and of organizing the exchange of goods—namely for the realization of the *autonomous production organizing character*—taken in the above sense. Thereby, not only the exploitation of advantages on the enterprise level of the integration would be possible but also the making profitable of possibilities to which the inter-state level is not directed but is not suitable either.

The contracts of specialization relating to e.g. the *product division*, to the specialization according to product nomenclature can liberate significant stimulating powers. The product division namely creates certainly some faint connection of interests between the parties (the parties cannot complete their stock of products by the defective products so that their assortment of products will not be complete). Some elementary degree of mutuality appears thus in the sphere of *turnover*. The General

[30] *Die rechtliche Regelung* . . . p. 208.

Conditions offer appropriate orientation that the minium connection of interests, being possibly concealed by the specialization—which, however, does not go beyond the essential separating character involving an opposite position in the commodity relations—would be realized by a concrete contract. For the actual establishment of such a contract, however, in addition to the system of the legal conditions, the implication of enterprise interests and a suitable system of national-economic conditions are necessary. Only in this way may it be achieved that no formal contracts of specialization would be concluded (which e.g. put down the existing situation but do not take aim at any essential improvement of structure and efficiency), moreover, specialization contract *would not* at all *be concluded* and the above-mentioned harmony of interests would not get lost among the stipulations of a long-range foreign-trade general contract of delivery.

The anxiety recurring in the literature is well-known that the intensification of relations of the economic organizations would lead to spontaneity, to a market anarchy. On the one hand, we should mention that whatever direct a relation may be, it is, however, established within the framework of the socialist integration based on planning co-operation, where the scope of these relations is determined from the beginning by the planning co-operation acts. On the other hand, it is not correct to contrast the micro-economic sphere and the planned order in such a manner that in the realization of the plan this sphere would mean a "by-pass" alien to the socialism.[31]

It is just on the contrary: today when the planning co-operation is a fundamental integration instrument of the interconnection of economic activities of the socialist countries, not only one "upper" administrative aspect shall be taken into consideration but also the other one manifesting itself in the relations between the economic organizations.[32] The essence of specialization contracts is: the *pactum de contrahendo* is suitable for stabilizing the relations of the parties due to its long-range barter character but in case also due to its *production organizing* character, and thus it is able to promote foresight. The long-range relations of the enterprises—if their economical character is proved in the practice—furnish appropriate bases for the planning co-operation activity. Accordingly, the specialization contracts of the economic organizations fit well into the mechanism of the socialist integration as legal institutions *promoting the planned order*. It is needless to say that such a role *cannot be expected* from a contract, hierarchically subordinate in every respect and in each case, being of an executive character, while practically being mainly formal.

16. All these may lay further claims *with regard to the contracts*. Only one example is to be mentioned. The main condition of "keeping watchful" the interests of

[31] SHIRYAYEV, op. cit. (n. 6.)

[32] EÖRSI, GY. takes the element of the purposefulness present in the relation of the parties for one feature defining the *character* of the contract on specialization: *A gazdaságirányítás új rendszerére áttérés jogáról* (On the law of the switch over to the new system of economic management), Budapest, 1968. p. 228.; see further FÖLDES, op. cit. p. 1290.

an enterprise consists in that that in case of a more severe quality problem the parties must not be too much connected on the basis of mere hierarchic-administrative considerations. The penalty system of the General Conditions does not relate to the continuous deterioration of quality (in this respect the sanctions relating to the occasional violation of the foreign-trade contract are decisive, similarly negliging technical development renders possible only damages). In a more mobile system of economic conditions of integration, appearing in the form of limited and controlled *economic competition* of the economic organizations a sanction of *warning* character may play a more important role. We mean here a clause having had a part of one time in the contractual practice but which has been lost since then. This clause rendered possible that the party could enter into a contract with another specializing party participating in the specialization contract to its preference if this one has offered the product with a better quality, if the previous partner did not undertake the supply with better parameters within a reasonable time limit.

This warning sanction *does not aggravate* immediately the relationship between the parties (like e.g. penalty or damages) and does not push the parties in the direction of getting rid of the legal relationship; it rather induces them to reorganize their relationship. The losses namely inherent in the reasonable economic competition are much more *lower* than the economic deadlocks of reproduction of poor quality or obsolete technics in the monopolistic position, which is, in addition, excused by the legal stamp of a valid contract.

The development of the autonomous function of production organization and specialization of the enterprise may give a considerable push to the specialization according to the phases of *component* and *unit part* as well as *technological process*.[33] The real significance thereof may be estimated if the fact is taken into consideration that *this type of specialization is the "antechamber" of the real co-operation in production*. Since, how may the relation hitherto described be qualified? The answer to the question raised in the introduction cannot be any more avoided. In what respect may specialization *and* co-operation be here spoken about, where are the co-operation elements of the legal relationship; altogether, what should be meant by specialization and co-operation?

[33] Recently, the report on the Session No. XXXIV of June 1980 established that "the extent of international specialization of uniform unit parts and components shall be amplified with a view to the intensification of the manufacture of end products."

V.
Concept and delimitation of specialization and co-operation in production

17. As already mentioned, the legal literature does not pay too much attention to this question, therefore the common use of the two concepts and their application for the above-analyzed system of relations—beside the occasional observance of the differences which is still more problematic!—are generally accepted.[34]

18. As for *Marx*, he saw in the co-operation the direct co-operation of many workers—which was not intermediated by the exchange, i.e. which took place within the phase of production,—for achieving the same result, for the production of the same product, of the same use-value.[35] His notion—although it relates to the co-operation inside the workshop—makes the *linking* and not at all the separating feature characterizing the specialization to be the fundamental particularity of co-operation.

19. The essence of the co-operation is approached by the various authors in a similar way:[36] they understand thereby *the common, collective productive activity* based on the production division of the components of the end product—that is the "individual labour division". *Kormnov* underlines, within it, the specialization relating to a component, or to the individual phases of the technological process. We also accept this notion. The specialization on international scale and the connection of the specialized production processes reach such a level that compared to it any foreign-trade relation—may it be, however, very close—seems to be occasional, accidental. The *restoration of the unity* of the divided working activities raises new claims: the claim to a co-operation comprising also the reproduction phases preceding and following the exchange of goods. The international co-operation in production is therefore that kind of labour division where the labour division means the *separated* performance of some phases of the production process, of certain economic functions, and then their *re-combination* for the sake of the finishing of the manufacture of an end product. The co-operating partners so to say mutually *complete* their capacity with that of the partner through the interconnection of activities.[37] Accordingly, in the co-

[34] In addition to the Hungarian legal literature: Soós, L.: *A KGST gyártásszakosítási és kooperációs polgári jogi szerződések fogalmáról* (On the notion of civil-law contracts on the specialization of production and co-operation in CMEA), Jogtudományi Közlöny, 8/1976. Cf. e.g. the cited papers of Gringolz, Hutschenreuter, Boguslavsky, as well as the report compiled in 1973 (MS) by the working group elaborating the General Conditions on Specialization in Production and Cooperation (Report on legal questions in connection with the formation and the performance of contracts on specialization of production and co-operation) as well as the cited volume *Das System rechtlicher Regelung der sozialistischen ökonomischen Integration.*

[35] MEGA, Volume 3, Berlin, 1976. pp. 229–230.

[36] Pécsi, op. cit. p. 48.; Kormnov, op. cit. (n. 14.) p. 91; Shiryayev, op. cit. (n. 6.) Chapter I.; the same author, op. cit. (n. 7.) Chapter I. ("... the partners ... change over from the independent manufacture of end products to the common production thereof"), and Chapter II.; Boguslavsky, op. cit. p. 147.

[37] Shiryayev speaks about the effective combination of certain elements of the productive apparatus of several countries (op. cit. n. 7.) Chapter II.

operation in production the productive units get in close connection and, at the same time, in *interdependence* with each other. The dependence means that none of them can return forthwith to the production without this labour division, therefore the maintenance of the co-operation becomes a common interest. All these mean that the productive units should participate in the co-operation with *effective productive work;* their productive activity and the result thereof, the end product, will be practically *materially common.*

20. This seems to be the decisive criterium of the co-operation in production pointing out at the same time, also the difference from the specialization. Since, although the specialization and the co-operation—as it is obvious from those said above—are connected in several points, moreover, they overlap each other the co-operation displays real identity with the characteristic features of the specialization described above (para 8) so to say in not a single point.

a) The co-operation is not the means of the sectoral labour division but that of the *individual* labour division: its purpose and function are not the elimination of parallelisms between the branches, but they are "more modest" than that; to bring into harmony the activities of the productive units through the partial *connection* of their capacities.

b) This attracts unambiguously the co-operation level of the enterprises: the international co-operation in production is essentially a category of the *enterprise level.*[38]

c) The subject of co-operation is not the realization of some large-volume specialized production program but it is normally a smaller one; it aims at the manufacture of *one single product* within labour division (this may be, of course, also a huge complicated equipment, a plant, etc.). The co-operation is therefore not sector-centric but *product-centric.*

d) Finally, the co-operation is—this is already obvious—not of a separating but of a *joining* character, from which the mutuality: the *two-directionalness* of the relation follows (reciprocal delivery of components, of spare parts, common developing activity).

e) This relation involves, as a matter of course, not the independent manufacture of the end product but the *orientation to the components, unit parts,* although the parties finally fasten their eyes on the less expensive manufacture of the end product.

Beside the enumeration of the differences, where is the overlapping to be found? This manifests itself in the estimation of the *relation* of the specialization and the co-operation to each other: more precisely, in the extent one is present in the other. It is obvious from the concept of co-operation elaborated by the economists (note 36) that the co-operation in production consists of two phases: first, from the agreement on *specialization* relating to the division of production of components, etc., and from the subsequent phase in which the result of the separate activities of the component

[38] Pécsi, op. cit. p. 51.; Bauer-Sábicz, op. cit.

production are recombined through *mutual deliveries*. This latter phase transforms the production process in its totality into a materially common one. The agreement on the specialization is followed by a *co-operation in trade* relating to the *inside* (production phase of the same) of the reproduction process. On the other hand, in case of the specialization, the agreement on specialization relating to the manufacture of the end product is followed by the agreement on a *co-operation in trade* relating to the next phase of the reproduction process, to the realization; the production phase is ended, therefore the trade co-operation may relate only to the outside of the production, to the realization. Consequently, with the specialization, no co-operation is taking place within the same reproductive phase, whereas with the co-operation *both of them* are present.

21. Therefore, the specialization—reducing the problem to its essence—is just a *qualified exchange of goods* (long-range undertaking of obligations relating to the order and to the delivery of the product) which does not go qualitatively beyond the construction of the long-range inter-state barter agreements, and may be taken as a quantitatively intensified specific variety thereof. On the other hand, the co-operation in production—since it takes place within the same (productive) phase of the reproduction process—creates a close *community of interests* between the parties.

Therefore, the specialization results in the separation of the parties through the labour division, without, however, that the labour division would dismember the production phase, and in addition, it results in a certain dependence. For the *surmounting* of the contradiction of separation and dependence, the usual foreign-trade channels and legal institutions offer—due to the production phase already finished—a suitable solution. On the contrary, the labour division within the co-operation in production splits up the production phase itself into parts, therefore a special legal institution is necessary to re-establish the dismembered unity of this phase, moreover, at a higher level. That is why it is necessary to exceed qualitatively the traditional foreign-trade barter relations.

22. Hence, the question posed early in the paper shall be answered in such a way that the specialization and the co-operation are *two, or essentially different phenomena,* which are to be treated in this way also by the law. There is no uniform category of "specialization *and* co-operation" as no such contract exists. The legal relations called today "contract on the specialization of production and co-operation" are actually *pure specialization contracts* and have nothing to do with the real co-operation in production. The trouble is caused by the fact that no distinction is made between the trade co-operation *within and outside* the same production phase; thereby, the two phenomena are actually confused.

VI.
Future of the co-operation in production. Contract of international co-operation in production

23. It is a commonplace in the literature that the co-operation in production is in practice very rare, the advantages of co-operations of smaller proportion based on the relations of the enterprises are not exploited, the co-operation is still in its early stage.[39] The *objective programs* aiming at the development of industrial branches manufacturing stressedly important products through multi-lateral common planning are today (through the channel of the planning co-operation) essentially specialization-oriented. In our opinion—after the main fields of the future cooperation are settled in the objective program on the inter-state level—a thorough *differentiation* should be made with the choice of the type of the co-operation. Not a definite type should be imposed upon the objective program but on the contrary: *on the basis of the contents and the objects of the program the most suitable type for the realization of the co-operation and the labour division should be chosen.* Since, however, the specialization is the instrument of the large-scale co-operation on a sectoral level, it is hardly contestable that it fits e.g. to the demands of the objective program, in energetics the labour division of specialization type, whereas for the objective program on consumer's utility goods, that of a co-operation type would be more suitable.

24. The co-operation, however, may mean a way out (as a matter of course, beside several other solutions) for solving such problems which are faced by the socialist countries due to the *world economic change of era* continuous since the middle of the seventies. As it is well known, due to the problems, the pace of the increase has diminished, whereas in the exportation to the non-socialist countries a shortage of goods, a lack of balance occurred.[40] It follows logically that the member-countries of the CMEA should try to find a solution for their equilibrium problems not separately but cooperating on third markets, through the co-operation in production.[41] Moreover: *Kormnov* considers desirable a European-scale specialization of unit parts and a co-operation between the two systems (though not mentioning the world-economic problems but obviously in connection therewith).[42]

25. Claims for co-operation in production are abundantly found in the socialist integration; the problem is caused by the fact that the development of the co-operation *is not rendered possible* by the present mechanism of the integration. From our exposition—we believe that not without any reason—the conclusion may be drawn

[39] Pécsi, op. cit. p. 48; Botos, op. cit. Shiryayev, op. cit. (n. 6.)

[40] The pace of increase of the common national income of the CMEA countries has been 7.4 per cent in 1966–1970, 6.2 per cent in 1971–1975 whereas between 1976 and 1980 it will be presumably 5.3 per cent. Földes, op. cit.

[41] Botos (op. cit.) sees also the way out in the co-operation; Csaba (op. cit.) transposes the problem more generally to the level of international mechanism.

[42] Kormnov, op. cit. (n. 14.) pp. 106–108.

that the law of the integration ought to begin the preparations already today for developing an economic mechanism establishing more favourable conditions—for the co-operation and especially for the labour division of the co-operation in production—and for meeting the legal demands following therefrom.[43]

The task is not less than to find such legal means which are efficiently able to express the essential community of interests of the contractual parties placed around the same pole of the exchange of goods, without establishing a common economic organization and combining financial means for this purpose. The connection of interests being faint at the specialization, however, is replaced here by the common interests involved in the manufacture of the common product in good quality, i.e. by the elements of a *joint venture*. This *community of interests* signifies a new feature as compared to the simple foreign-trade contract of delivery, or to the specialization contract comprising the promise of the formation of a contract. This community of interests renders possible the *co-ordination* not only *of* the productive *activity* but of the research and development activity preceding the production and of the activity in the realization phase following the production (e.g. service).

The community of interests and the co-ordination of activities *keynote* the contract of co-operation in production. At the same time, it is a fact that the parties exchange the components produced by them in the framework of contracts of delivery which—since the parties are placed on the opposite poles of the commodity relations—reduces the community of interests. It is to be seen that—like with the contracts of specialization—*two legal relationships* exist between the parties also here. In the *basic legal relationship* they establish the contract relating to the common production, whereas the exchange of the unit parts and components is agreed upon in several *contracts of delivery*. In the basic legal relationship the parties are placed on the same pole of the commodity relations, but the clash of interests appearing in the contracts of delivery removes them from here. In these contracts the parties face each other as sellers and buyers. The defect in quality of the delivered components or the delay of the delivery may temporarily put into the shade the community of the interests of the parties, though it does not bring it to an end. If it would put an end thereto, the matter would be then a problem touching upon the basic relationship. A special contradiction is faced here that namely in this imagined contract of co-operation some legal relations concerning the delivery realizing just the basic legal relationship *loosen* the community of interests of the parties. Since, however, the community of interests signified in the basic legal relationship holds together the parties, this community of interests of higher level is *able to release from time to time* the clash of interests appearing in the legal relations concerning the delivery. If, however, the advantages expected from the co-operation do not appear for a longer time, the relationship between the parties—

[43] SHIRYAYEV notes that the co-operation brings several new moments both into the relations between the parties and into the forms of exchange of the results of productive activity; for this purpose, however, particular agreements are necessary (op. cit. n. 7.)

as a hopelessly deteriorated marriage—definitively slackens and mostly will be broken off.

26. As for the basic legal relationship, *three* particularities follow from those said above: first: the long-range and frame character of the legal relationship; secondly: the necessity of an intensive co-ordination of the activities; thirdly: a limited possibility of application of the system of sanctions ensuring the performance of obligations (the role of penalty diminishes, whereas the importance of rescission increases).

The afore-said simultaneously points out the close *connection* existing between the basic legal relationship and the legal relations concerning the contracts of delivery realizing the basic one. The contracts of delivery namely form in their totality a certain *system* the performance of which means to a considerable extent the performance of the contract of co-operation itself. The contracts of delivery cannot be examined separately either from each other, or from the basic legal relationship. The connection between the two legal relationships is much closer, than with the contracts of specialization, and it is also different from the latter considering its character.

27. The schematical survey of some features of the contract of international co-operation in production did not strive after being perfect. The purpose was only to point out the dissimilarity of the legal institutions of the contract of specialization and the contract of co-operation, as well as the fact that the development of the latter should be perspectively reckoned with, and—in our opinion and also in the opinion of others—this latter could already today considerably improve the prospects of the successful progress of the integration. Nevertheless, the law should offer by its specific means several alternatives for solving the problems of the economic life; for the very reason that among them the most suitable solution could be chosen.

Гражданско-правовые проблемы специализации и кооперирования производства в рамках СЭВ

И. Вереш

Автор в статье изучает место и роль института «международная специализация и кооперирование производства» в экономическом и правовом механизме СЭВ и приходит к выводу, что в настоящее время «специализация и кооперирование производства» покрывает чистую специализацию. От этого надо отграничить кооперирование и его договорную форму; роль договора по кооперированию в интеграции существенно отличается от этого. Несмотря на то, что перед развитием договора по международному кооперированию производства стоят существенные барьеры, автор на такой позиции, что экономика — социалистическая экономическая интеграция равно как и наступление нового периода в мировой экономике — претендуют на развитие правоотношений типа сотрудничества. Важный шаг по этому пути представляло бы собой оформление договора по международному кооперированию производства.

Die zivilrechtlichen Probleme der Produktionsspezialisierung und Produktionskooperation im RGW

I. Vörös

Der Beitrag sucht den Platz und die Rolle der „internationalen Produktionsspezialisierung und Produktionskooperation" im wirtschaftlichen und rechtlichen Mechanismus des RGW und gelangt zu der Konklusion, daß die gegenwärtige „Produktions- und Kooperationsspezialisierung in der Wirklichkeit eine echte Spezialisation ist. Sie muß von der Kooperation und deren vertraglichen Form streng unterschieden werden; der Kooperationsvertrag hat in der Integration eine wesentlich unterschiedliche Rolle. Der Entwicklung des internationalen Kooperationsvertrags auf dem Gebiet der Produktion stehen zwar wesentliche Hindernisse in dem Weg, der Beitrag äußert jedoch die Meinung, daß die Wirtschaft — sowohl die sozialistische Wirtschaftsintegration, als auch der Epochenwechsel der Weltwirtschaft — die Entwicklung von kooperationsartigen Rechtsverhältnissen beansprucht. Die Herausformung des internationalen Produktions-Kooperationsvertrags wäre auf diesem Weg ein wichtiger Schritt.

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The problem of treaty-making between the CMEA and the Common Market

L. VALKI
associate professor
Eötvös Loránd University, Budapest

The Common Market is inclined to establish very restricted legal contacts between the two organizations, while the CMEA proposes rather wide-ranging regulation, i.e. to include the most-favoured-nation clause and the principle of non-discrimination in the treaty. In the Community's opinion, the CMEA is incompetent in these matters. The author points out that the socialist integration is entitled to agree to any treaty, supposed that the subject of the treaty is under the competence of the organization. The Charter does not delimit exactly the extent of this competence and the activities of the organization did not cover so far common commercial policy. Nevertheless, the articles of the treaty proposed by the CMEA do not presuppose an active commercial policy. The above-mentioned propositions may be met by the Common Market without common CMEA commercial policy towards third parties.

It is a general experience that while in the political sphere a fairly extensive co-operation can be brought about without the establishment of an institutionalized framework between the states, the economic co-operation demands the creation of substantive and organizational-procedural norms of increasing precision. It is by no means accidental that besides the United Nations the legal framework of the international economic organizations has reached high standards and exactly these organizations have contributed remarkably to the development of general international law. It is an important landmark in this field that the members have authorized some of these organizations to acquire rights and enter into obligations in their own name. In this way, these organizations may serve the ends for which they have been called to life more effectively.

Some years ago, the institutionalization of relations between the CMEA and the Common Market has been taken up.[1] Both of the parties formulated their conceptions as regards the establishment of the relations, moreover, each of them elaborated a draft-treaty, upon several essential stipulations of which, however, the parties could not yet agree. This paper analyzes the legal questions relating to the treaty-making, in the first place that one, with which powers the CMEA and with which the Common Market is vested in this field.

[1] On the previous development of the relation between the two integrational organizations cf. VALKI, L.: *A Közös Piac szervezeti és döntéshozatali rendszere* (Decision-making in the Common Market), Budapest, 1977. pp. 385–393.

Until recently the CMEA was not vested with international treaty-making power. The expansion of the international division of labour, the progress of the CMEA integration, the growing interest of third countries in the economic co-operation with the socialist states, and last but not least, the mutual rapprochement of the CMEA and the European-Communities have prompted the CMEA to amend its Charter according to the changed conditions.

The lack of treaty-making power did not mean, however, that the organization could not maintain relations with third states or other international organizations. The 1959 Charter of Sofia contained the following provisions in this respect:

Article 10—*Participation of other states in the work of the Council:* "The Council of Mutual Economic Assistance may invite to participate in the work of its organs also those states which are not members of the Council. The Council defines the conditions under which the representatives of these states may take part in the work of organs of the Council on the basis of agreement with the respective states."

Article 11—*Relations with international organizations:* "The Council of Mutual Economic Assistance may establish and maintain relations with the economic organizations of the United Nations and other international organizations. The Council defines the nature and form of these relations on the grounds of agreement with the respective international organizations."

From Article 10 it is evident that, at the time of the formulation of these provisions, the members of the CMEA had not in mind that the CMEA should ever appear as an *economic unit* in the international relations. They did not suppose that the CMEA could have at all relations of such character to third states which should be regulated. This is the reason of the formulation that non-member-states "could take part" in the work of the Council. Hence, in conformity with Article 10 it is not two units (a state and an organized group of states) which enters into relations but merely the participation of one unit (a state) in a joint economic venture of another unit (an organized group of states). As for its nature, this venture in all cases remained an internal affair of the CMEA and could not be substantially modified even by the participation of a "foreign" party.

At the same time, it seems as if Article 11 had set out from different understanding. It spoke of the CMEA as a formation relatively independent of its member-states which established and maintained relations independently with the economic organizations of the UN and other international organizations. From various documents of the CMEA and the practice so far followed it is, however, evident that the founders of the organization did not even in this respect have in mind the economic relations of two larger units of a group of states but they merely envisaged a certain co-operation of the administrative organs. This will hold also as far as the economic organizations of UN are concerned since the member-states of the CMEA are mostly also members therein. Still for practical purposes, the situation was very much the same in respect of non-UN organizations.

The reason of this circumstance may be as follows.

First of all, *the CMEA as organization has never endeavoured to bring about an economic unit wholly separated from world economy as a whole.* There is not a single mechanism within the CMEA which would have similar function as e.g. the different mechanisms of the Common Market. There is not customs union, nor is there a free flow of capital between the ten states, no common systems of external economic protection have been established, neither do the member-states pursue a joint commercial policy, etc. Generally, it was not intended by the CMEA to create in the given multinational region economic conditions as if it were the case of a single, uniform region. Therefore, in this sense the CMEA did never strive for the integration of the national economies or for the coalescence of segregated formations. The mechanisms of co-operation of the CMEA rather had as their function the extension of the mutual division of labour of the separately existing economic units. Merely for historical reasons, a situation has developed where the division of labour have not developed in multilateral dimensions; the exchange of goods and settling the accounts still take place in bilateral form. Consequently, the mechanisms of the CMEA have been brought about with a view *to developing bilateral trade, the co-ordination of the national economic plans, the specialization of production and the promotion of industrial co-operation.*

Thus, this character of the mechanism of international co-operation of the socialist countries precluded for the time being the need for, and even the possibility of the acting of the CMEA as a unit in international economic relations with either third states or other international organizations.

The other reason of the formulation of the cited provisions is to be found in the political-legal conceplation valid in that time. The international law and the political contemplation of socialist countries *did not yet accept at the end of the fifties the conception that international organizations could be subjects of law.* The starting point was that only the states can become subjects of international law. "The essential feature of subjects of international law is namely—stated a paper—the disposition of supreme power in international field which renders them able to take part in legislation, to undertake obligations."[2] Consequently, the treaties in the conclusion of which also international organization participates, oblige not directly the organization but the states behind the organization. The organization can enter in a treaty only under delegated powers but never by its own right. Those sharing this opinion resumed that the recognition of the subject of law of international organizations would mean simultaneously the recognition of their being "supranational" and, in this way, it would affect the sovereignty of the member-states. Especially unfavourable opinions were voiced in this respect against the Common Market the founders of which have invested their organization with the treaty-making power. According to them, the relatively wide-ranging powers were the undeniable prove of the supranational character of the West-European integration.

[2] Cf. Моджорян, Л. А.: *Субъекты международного права*, Moscow, 1958. p. 7.

Later, however, the socialist literature on international law abandoned this attitude. Several authors pointed out that legal personality did not mean more than some units had rights and obligations in a given legal system.[3] It depends exclusively on the legislators whom they want to invest with legal personality. In the international life where the states obviously have the possibility of original legislation, nothing excludes that they invest also their organizations with treaty-making powers i.e. with the acquisition of rights and undertaking of obligations. The enforcement of the opposite attitude would mean just the curtailment of the sovereignty. The sovereign state has namely unrestricted legal capacity, consequently its treaty-making capacity is similarly unrestricted. The state may undertake any obligation, may acquire any right and may enter into agreement on any subject with other states. Why just the possibility would be forbidden for it to invest an organization whose member it is, with treaty-making power within the scope of authority defined by it?

The international legal literature has not presumed any more an equality between supranationalism and treaty-making capacity and has not excluded the possibility that the CMEA became a subject of international law. This change of attitude contributed undoubtedly to the amendment of the Charter of the organization, more precisely, it cleared away the obstacles thereof.

The necessity of the amendment, however, had an other—rather technical—reason, too. By virtue of the above-cited provision of Article 11, seemingly, any contract could be signed with any international organization, but the original Russian wording precluded it. The Russian text spoke of "*dogovorennost*" which was not the same. This expression in Russian legal terminology includes *agreement* on etymological grounds only, but not on grounds of legal terminology. If, therefore, a certain text spoke of "*dogovorennost*", an agreement could though be reached with the other party, still this did not imply the signature of an agreement—and more less an international treaty. The authority conferred by the original Russian wording is, therefore, narrower than its translation and since the authentic wording of the Charter was the Russian, it had to be amended in any case.

Since after 1959 several organizational-institutional changes have taken place within the CMEA and the Complex Program of Bucharest has brought about changes of content in the activities of the organization, the member-states of the CMEA have decided to incorporate all changes uniformly and in conjunction in a new wording.

After a thorough preparation, this new wording has been elaborated in 1974 and the amendment has been accepted by the leading organs of the CMEA. Subsequently, the member-states have ratified, in conformity with their constitutional provisions, this amending treaty which has entered into force in 1976.[4]

[3] Cf. Haraszti, Gy.: *A nemzetközi jogalanyiság kérdéséhez* (To the question of international legal personality), Acta ELTE, Tom. II. Fasc. I, 1960.; Тункин, Г. И.: *Вопросы теория международного права*, Moscow, 1962. pp. 17—19.; Талалаев, Д. Н.: *Юридическая природа международного договора*, Moscow, 1963. p. 63., etc.

[4] Cf. Valki, L.—Ransburg, G.: *A KGST Alapokmányának módosításáról* (Amendment of the Charter of the CMEA), Külgazdaság, 2/1976.

Already the very first provisions of the amended wording refer to the right of international treaty-making. A new sub-section (b) has been taken up in section 2 of Article 3, according to which CMEA "may—in conformity with the present Charter—sign treaties with the member-states of the Council, with other countries and with international organizations". Simultaneously, the title of the previous Article 10 (at present Article 11) has been changed from "Participation of Other States" to "*The Relations of the Council with Other States*". The provision of this Article, that the organization may invite to his work also states which are not its members, has though been preserved, still completed with the following words: ". . . or can establish co-operation with them in another form".

The following Article 12 (the former Article 11) renders possible further on the establishment and maintenance of relations with various international organizations. The only amendment is the change of their designation: instead of "the economic organizations of UN" "organs and specialized agencies of the UN" are mentioned, a modification which improves the terminology used in the Charter.

Both Articles have been modified in their substance by the addition of words referring to the *form* of regulation of the relations with third parties. In the meaning of this modification the CMEA brings under regulation any kind of co-operation with third states or international organizations "by virtue of agreement, especially (usually) by signing agreements". This term—together with the previous one—refers unambiguously to the fact that henceforth, the CMEA also as an independent unit may sign treaties with third state, namely in such fields which belong to the competence of the organization. In this way, the CMEA virtually acquired the *general power of treaty-making* and, in this respect, it is not limited but by the provisions of integration, i.e. Article 3 of the Charter on the activity and sphere of authority of the CMEA.

It is again another question that this Article deals with the integrational activity of the organization further in highly generalized terms. The Charter does not contain a precise list of powers, it merely enumerates the fields (industry, agriculture, transport, harmonization of plans, specialization, co-operation, exchange of goods, exchange of scientific-technical results, respectively) in which the CMEA organizes the co-operation of member-states. This means that in a concrete treaty-making question it is impossible to proceed exclusively from the Charter, since this does not contain any restriction but does not pronounce positively either upon what the CMEA can agree with third parties. Therefore, it may occur in principle e.g. that the leading organs prepare an agreement on such questions which would actually belong though to the integration and co-operation mentioned in Article 3 but in respect of which within the CMEA no common activity has started yet.

If the statute says nothing about the powers of an international organization, usually the resolutions of the leading organs are decisive. The member-states namely do not define precisely the scope of powers in advance because it is not yet possible in the moment of the establishment of the organization. If they would strive after a comprehensive regulation, later the leading organs would be thereby bound and the

troublefree development of the organization would be impeded. It is more advantageous if the leading organs themselves shape the powers of the organization by continuously made decisions. In case of doubt, it should be revised only whether the given case had already "internal" antecedents. If so, the agreement can be concluded. If not, the agreement cannot be signed until no respective decisions are made, and the common activity within the organization is not started. This is the case also with the CMEA. Since in the CMEA only unanimous decisions can be made, the risk is not involved that the leading organs "become detached" from the member states and extend the powers of the organization against the interests of the member-states or enter into agreements with third states or international organizations.

The Charter does not provide, even after the amendment, for *the process of treaty-making*. As in other questions of decision-making, the founders have left the practice to formulate the appropriate rules. However, since the above-mentioned two Articles name the Council as subject of treaties, obviously the central organ of general competence of the CMEA—i.e. the General Assembly—is authorized to make the required decisions. There are no obstacles to the attendance of the government representatives of the member-states at the negotiations so as to have first-hand information of the progress made. The latter, namely the government representatives may figure even among the signatories and so give birth to agreements of "mixed character" i.e. agreements where the organization and the member-states are equally subjects. Whether or not such agreements have to be ratified will, in all likelihood, be determined by their subject matter. It may hardly be necessary to ratify an agreement on—let us say—the exchange of statistical information. Cases may, however, occur when with the progress of the CMEA integration agreements may come to be made in domains, too, where ratification is indispensable.

The agreements so far signed (e.g. with Finland) date back to a time before the amendment becoming effective and do not affect material economic relations. The purpose of these agreements was, in the first place, the laying of the frameworks of co-operation so that there was no need for their ratification. The representatives of the governments of member-states, however, also attended together with the representatives of the Secretary, the negotations.

Which are the treaty-making powers of the Common Market?

With full knowledge of supranational notions in connection with the Common Market it is a surprising fact that the organization has not been invested with general treaty-making power. There is not a single provision in the Rome Treaty which would have granted unrestricted powers to the Community to conclude treaties. Only three concrete cases are when powers are granted:

1. In conformity with Article 113 *the common commercial policy* has after the expiry of a transitional period to be continued "on uniformly established principles" particularly in regard to the conclusion of tariff and trade agreements. Later, this article has given rise to disputes in both the practice followed by the Community and in professional literature. Many have namely called into doubt the interpretation as if by

virtue of this provision only the Community could sign tariff and trade agreements with third states and international organizations. The term namely that the commercial policy shall be continued on "uniformly established principles"—it was said—refers to the maintenance of national treaty-making power. The member-states shall not but establish in advance the principles by virtue of which they will enter into negotiations, and sign the treaties, respectively.[5]

The dispute has been settled by the Council in 1962. In the form of a resolution an authentic interpretation has been given to Article 113 and it was held that even during the transitional period action had to be taken by the member-states for the unification of commercial policies. After the expiry of the transitional period the above-mentioned agreements could be signed exclusively by the leading organs of the Community.[6] Neither the Rome Treaty, nor the position taken by the Council contained direction in that respect what whould be done if third state would not recognize the Common Market as subject of international law and did not want to establish therewith a relation by agreement.

2. Articles 229–231 specify indirect powers of treaty-making. According to their wording, the Common Market maintains *"appropriate relations"* and *"close co-operation"* with the United Nations, their specialized agencies, the GATT, the Council of Europe, the OEEC, and if expedient, *"with all other international organizations"*. Although these Articles do not expressly mention the right of treaty-making, still both in professional literature and in practice a wholly uniform affirmative position has been taken in this respect. However, nothing is said in these Articles of what the content may be of inter-organizational agreements. In our opinion, since the case is one of the maintenance of "relations" and "co-operation", the founders of the Common Market, too, had not rules of substantive law in mind at the wording, but provisions of an administrative nature regulating such co-operation. The agreements containing such provisions cannot touch essentially upon the position of the member-states, moreover, it is not at all sure that they would give rise to direct rights and obligations in their respect.

3. The third power to treaty-making is to be found in Article 238. Accordingly, "the Community may conclude with third country, with a union of states or with an international organization, agreements creating an *association* involving reciprocal rights and obligations, joint action and special procedures". With respect to the right of treaty-making the wording is unambiguous. The situation is, however, an altogether different one as regards the content of the agreement so made. The reference to "reciprocal rights and obligations" and to "joint action"does not clearly state the content, nor does the term "special procedures" specify by what such an agreement differs from other international agreements. The content of hitherto concluded

[5] Cf. EVERLING, U.: *Legal Problems of the Common Commercial Policy in the European Economic Community*, Common Market Law Review, Vol. 4. No. 2. 1966. p. 150.

[6] Amtsblatt der Europäischen Gemeinschaften, September 25, 1969, p. 62.

agreements of association, however, points out that the leading organs have interpreted this Article as general powers of treaty-making, since close economic relations have been established with the associated states. At any rate, the member-states have agreed with this interpretation.

As regards the *procedure of treaty-making*, in conformity with the general rule, the Council has powers to conclude treaties, whereas the negotiations come within the province of the Commission. In the event of tariff and commercial agreements the provision shall be completed with the rule that the Commission brings forward suggestions to the Council as to the formulation of the content of agreements. The ministers then on the ground of the suggestions authorize the Commission to take up negotations, and then in the form of guidelines define the tactics to be followed in the negotiations. In these negotiations the Commission relies on the support of a special committee formed of government representatives appointed by the Council. It is worthwhile to note that on the above decisions—correspondingly on the treaty-making—decision is reached by a qualified majority of the ministers. At the same time, the representatives of the member-states may veto the conclusions of agreements for association. As regards the treaty-making all that the Rome Treaty decrees is that before the signature the European Parliament must be consulted. If an agreement has to be signed with an international organization the same rules will hold, i.e. the negotiations are carried on by the Commission, the agreements are, however, signed by the Council.

In conformity with the Treaty of Rome, the Council and the Commission act autonomously, i.e. as regards the content of agreements or their coming into force the member-states have no further say in the matter. In this way, the agreements have a direct binding force on the member-states from the moment the Council declares the agreement to have been concluded. There is neither ratification nor any subsequent procedure of approval required.

Virtually, the *actual* procedure of treaty-making departs in many respects from the provisions of the Treaty of Rome. Above all, the 1965/1966 crisis of the Community, which for a long time to come excluded the passing of majority decisions, had an effect on the relevant provisions of the Treaty. Therefore, all agreements of the Community are passed by the completely unanimous decision of the member-states irrespective of the rules of decision-making the Treaty of Rome provided.

The second difference is of similar character. Although the Rome Treaty decrees the involvement of a special committee of government representatives only at the signing of tariff and commercial agreements, in practice on each occasion the member-states appointed their representatives who attended the conferences to their end, moreover, took an active part in the talks. Formally, though the representative of the Commission acted for and on behalf of the Community, the other party might easily have the impression as if he were negotiating not with one but earlier with seven, now with ten parties. The government representatives showed extreme vigilance when it came to safeguard the national interests of their countries. By this procedure, the

member-states might closely follow each phase of the negotiations and control their process so that the Commission had a very modest chance only for enforcing its own policy.

The predominant role of national interest has been noticeable also in the practice of the Community's treaty-making policy. Often the member-states have gone as far as to lay claims to the signing and even the ratification of the agreements so that the subsequent decision of the Council on undertaking of obligations has become merely a formal legal act. The agreements signed by the Community—in particular those for associations—can therefore be hardly distinguished from other multilateral conventions, since they are *signed by all participating countries* and, according to their final clauses, they come into force *after the instruments of ratification have been deposited by all countries*. It is in this way that the so-called "mixed agreements" have come into being, where the member-states, the associated states, the Council and the Commission were equally parties.

From what has been set forth it is evident that the founders have invested the two organizations with appropriate powers. The question is only how these organizations will make use of these powers in their practice. This matter obviously will not be decided by legal considerations. Whether the two integrations of Europe will conclude agreements with each other and if so, with which content, is an important political question — obviously for both parties. The upshots up to now do not give rise for the moment to too much optimism. A long time passed since Gromiko came forward in an initiative manner in this respect on the preparatory meeting of the European Conference on Security and Co-operation in 1973 in his negotiations with the President of the Council, the Danish minister of Foreign Affairs, Anderson. In the course of these eight years it has become obvious that the Common Market which has always found wanting the diplomatic recognition from the side of socialist countries, is far from being ready to develop relations on the merits with the CMEA. The reason thereof was semi-officially defined in that he does not want to "upgrade" the role of the Soviet Union within the CMEA on the expense of the smaller socialist countries, he does not want to strengthen the socialist integration. Several Western politicians and experts have elucidate in vain that the Western interests would be better served by the institutionalization of the relations developed with the CMEA. They referred in vain to the general experience that the operation of international organizations would offer much more possibilities to the enforcement of interests of smaller countries than allowed generally by the traditional diplomatic relations (i.e. just the position of small socialist countries would be strengthened by the institutionalization of the relations), nothing has altered the readiness to agreement of those in Brussels.[7] Many people draw

[7] Cf. — *inter alia* — BOLZ, K.: *Zwischen Anerkennung und Ablehnung — Das Verhältnis zwischen EG und RGW*, in: Die EG-Außenbeziehungen (ed. HASENPFLUG, H.), Hamburg, 1979.; SCHULZ, E.: *Überlegungen zur Gestaltung der Ostbeziehungen der Europäischen Gemeinschaft*, in: Die Ostbeziehungen der Europäischen Gemeinschaft (ed. SCHULZ, E.), München/Wien, 1977.

therefrom the conclusion that not so much the anxiety of the Common Market about the situation of smaller countries impeded up to now the agreement but rather the survival of political tenets remained here from older times.

These questions were, of course, not discussed at the negotiations of the parties. All the more was spoken about the legal problems. One of the debated questions was in the first period to what extent the introduction of the common commercial policy of EC concerns the socialist countries. Is it really necessary to enter into agreement with the West-European organization or may they reserve the right to choose independently their contracting parties. As it is known, the Community did not offer any more after 1st of January 1975 the possibility to its members to conclude bilateral agreements with third countries, therefore since that time an unregulated state prevails in the trade between the Common Market and the socialist countries. As is well-known, according to the official attitude of Brussels, commercial agreements shall be concluded in such a way that one party shall be the organization, whereas the other one a third state. In this connection they referred to the agreements the Common Market signed previously with several countries—e.g. with Yugoslavia and Rumania. On the other hand, it is also known that the socialist countries refused this solution partly because they found the situation unequal that the member-states of the CMEA enter into negotiations separately with the Community as with an economic great power (only the Soviet Union could have appeared as a party equal in rank) and partly because they found that the Community intended to use this means for the political division of the socialist countries.

This problem cannot be solved solely on the basis of international law considerations. It may be stated at any rate that the decision of a group of states cannot legally effect third states. Consequently, the Community cannot independently determine with whom the socialist countries should enter into legal relationship. The argument much cited in the literature of the Common Market that their organization—like the UN—is an "objective" subject of law and if once established, it must take the place of member-states in legal relations with third countries, does not stand fast. The position of the organization—and the UN is just the single exception—is not identical with that of the state. The states—due to the mere fact of their formation—become subjects of the international law, whereas in case of the organization, the decision expressed in the Charter of the founders is required thereto. This decision is, however, relevant only in the relation to each other of the founders, but not in connection with third parties. These parties can freely decide upon whether they recognize the organization as subject of international law or not and after a possible recognition, whether they are ready to enter into treaty obligations with it or not. The recognition has in this case an other legal effect than in case of the states. The recognition of the latters may be only a declarative act, whereas that of the former of constitutive character.

If it is, therefore, necessary to regulate the relations of a group of states with a third state, it cannot be expected from the latter to sign an agreement at any rate with

an international organization having treaty-making power in the field in question. If the third state does not want to recognize the organization for one reason or another, or after the recognition she does not want to enter into legal relation with it, its members shall be in principle ready to conclude bilateral agreements. This is supported, however, by the principle of treaty-making freedom.

As a matter of fact, this principle holds good also in the opposite relation: neither the members of the group of states in question can be obliged to conclude bilateral agreements if they do not want to do so. The law does not give and cannot give any solution. The circumstance, however, must not be left out of consideration that in Europe the commercial relations were regulated up to the above-mentioned time by bilateral inter-state agreements, and *the members of the Community were who wanted to change the status quo*. The responsibility for the present state of affairs must not shifted upon those who do not absolutely agree in this unilaterally decided change.

Especially not if considered that an essential part of commercial and association agreements the Community signed hitherto with third states—as it was to be seen—can hardly be distinguished from conventional multilateral agreements. When the government representatives of the member-states attend the negotiations and then take part in signing the agreement, moreover, when the agreements are put up for ratification, then the Community becomes only one of the signatory parties. To force the exclusive representation if the difficulties could be surmounted quite simply by the application of an already existing form of treaty-making, can be hardly regarded as a well-intentioned political attitude.

None of the socialist countries opposes that the Common Market harmonize the commercial policy of its member-states. This could be done, however, even if its member-states would have kept to the practice of bilateral agreements. A good example thereof is the obligatory consultation process introduced in 1974 with the conclusion of industrial co-operation agreements and applied hitherto.[8] According to the decision of the Council if the member-states want to negotiate with third states on the conclusion or on the prolongation of validity of such an agreement, they must inform immediately each other and the Commission. If one of the member-states or the Commission claims within eight days, consultations must be held in the framework of a special committee of government representatives. The purpose of consultations is to ensure that the co-operation agreements correspond to the objects of the common commercial policy. The decision of the Council does not mention what should happen if the consultations would not resolve the arising misgivings; the concerned parties may appeal certainly to the Court of Justice of the Common Market in accordance with the relevant provisions of the Rome Treaty. Although no such Court procedure occurred hitherto in the framework of the organization, the obligatory consultation process seems, however, by itself to be an appropriate instrument for the co-ordination of the treaty-making practice.

[8] Amtsblatt der Europäischen Gemeinschaften, L No. 208., July 30, 1974.

The other problem raised from the very first time on the side of the Common Market has been the *question of the competence of the CMEA*. According to them, neither the modification of the Charter of the CMEA would authorize the organization to conclude agreements of considerable economic effect—such as commercial agreements. They refer thereto that the CMEA—as against the Community—has no common commercial policy, has no common customs border, does not apply common import quota, etc. Consequently, the agreement between the two integrations cannot contain stipulations of commercial policy content because the member-states of the CMEA have further on reserved their sovereign rights. At the same time, the Common Market has the suitable competence because its member-states have delegated several powers to the organization in the course of the past more than two decades and—they add—the matter is here not only the delegation of treaty-making power but also the development of cooperation realized in every spheres of commercial policy. Referring thereto, the Community has opposed—and opposes also today—the taking up of the most-favoured-nation-clause as well as the prohibition of discrimination into the inter-organizational agreement, asserting that only the member-states of the CMEA can agree on questions of such nature with the Common Market. Moreover, according to their proposal, the inter-organizational agreement could definitely refer to that on the important quota, on the application of the most-favoured-nation-clause, on the various protective mechanisms, as well as on the removal of impediments to the commercial turnover the Community and the member-states of the CMEA should later on entered into agreement.

This position is, however, legally untenable. As has already been made clear, with the modification of the Charter, the member-states have vested full treaty-making powers in the CMEA, which means that the CMEA may sign any agreement to the subject matter of which the competence of the organization extends. It is, however, true that the Charter says nothing about the precise extent of these powers and it is also true that the leading organs neither have hitherto decided upon the development of a common commercial policy. The fact is, however, that the *content of agreement suggested by the socialist countries does not suppose any active commercial policy on the side of the CMEA*. The provision for the most-favoured-nation-clause and the suspension of discrimination mean such a unilateral act which could be effected by the Common Market even if the socialist integration does not apply any kind of commercial policy against third parties. As for the CMEA, it would make decisions which would oblige its own member-states to take the appropriate internal legal measures.

Incidentally, the competence of CMEA developed by the leading organs is *by no means narrower* than that of the Common Market. It should be namely taken into consideration that the two integrations accomplish co-operation of qualitatively other character. The participants of the West-European integration endeavour to the elimination of the factors impeding the division of labour resultig from the development in separated economic institutional systems of their states and they are

going to establish a multinational institutionalized system in their region. Their aim is to produce in this region conditions similar to the domestic ones for the division of labour, and for the micro—i.e. inter-company—integration, respectively. For this sake, they created the free flow of the factors of production, and then they took measures—for the moment, essentially unsuccessful—to harmonize their national economic policies. The participants of the socialist integration, however, do not strive after the establishment of a uniform, institutionalized system, after the removal of economic barriers existing between their states. Their activity tends towards the harmonization of national economic policies, more precisely towards the bilateral and multilateral harmonization of national economic plans, towards the organization of international specialization of production and of the co-operation. While, therefore, the Community intends to realize the extension of micro-integration by means of macro-integrational mechanisms, in indirect way, the CMEA tries to promote the micro-economical co-operation directly, mostly without the application of macro-mechanisms. This means that while the West-European integration displays activities in the field of *trade* only, the East-European integration deals in the first place directly with the problems of *production*. The essence of the matter is to be found in that both organizations have considerable decision-making powers *in the own sphere of activity*. The Common Market has wide-ranging powers e.g. in the development of the commercial policy but cannot decide upon the specialization among the member-states of the production of an article. Whereas the CMEA can make decisions on specialization and even if it did not produce decision-making powers for itself in the field of commercial policy, its plan-harmonization activity goes far beyond that what has been ever produced by the Community in the field of co-ordination of economic policies.

All these show that the contestation of the competence of *the other party* is a hardly justifiable measure; in all likelihood, it has the only purpose of concealing the lack of political will.

In other questions the differences of opinions have been earlier eliminated or such ones did not at all occurred. In the period of establishment of relations between the two organizations a still much debated question was e.g. *who should negotiate* in their name. At first, the Commission did not want to take seat at the conference table together with the representatives of the Secretariat of the CMEA and instead, it preferred to meet the representatives of the governments. They mentioned that the Secretariat had no independent decision-making powers within the CMEA, let alone in the international relations. In reply thereto, the CMEA declared also that it wanted to negotiate with the representatives of the member-states of the Community and not with "eurocrats" of Brussels.

As for the competence of the two bodies, it is an indisputable fact that that of the Commission is much wider. Whereas namely the Secretariat of the CMEA discharges only functions of an administrative character and has among its duties the preparatory work for decision-making, the Commission may make decisions of an autonomous

character in the field defined by the Treaty of Rome, decisions, namely, which are directly binding on the member-states, entreprises and even on private persons. It also remains a fact that whereas the Treaty of Rome expressly authorizes the Commission to negotiate agreements with third parties, there is no provision of the like taken up in the Sofia Charter. This is, however, wholly irrelevant from the point of view who should be the negotiating party. The CMEA namely, may within the limitations of international courtesy appoint any person or organ for continuing the negotiations. The only condition is that the representative so appointed should be authorized to make valid declarations on behalf of the organization. If there are no provisions in the Charter on this point, obviously the organ authorized to decision-making in the given case has powers to make the required decision. The Common Market can in no case raise objections to this procedure, since the appointment of the person or organ to take part in the negotiations is a proper "domestic affair" of the CMEA. The situation is, of course, the same *vice versa;* the Common Market decides also within its own competence on its representation.

Subsequently, this question was successfully agreed upon so that the agreement on *the level* of delegations was not any more impeded (in this question the mutual understanding is necessary quite apart from the above-mentioned disputes, in accordance with the diplomatic practice). Contacts between the two organizations have been established on the level both of the representatives of the organizations and of the representatives of governments.

It has early become evident that the parties have been ready to co-operate in other fields hitherto not mentioned—since not discussed — such as the exchange of trade and economic statistics and economic prognoses, as well as the protection of environment and the standardization. As long as, however, no agreement is entered into in the main questions, as a matter of course, the starting with the effective co-operation cannot be expected either in these fields.

With respect to the conclusion of the definitive agreement and to its moment no forecast is possible. It is, however, sure that the conclusion of the treaty would be advantageous for the people participating in the integration. To all appearances, the Common Market must change its political attitude for this purpose and then the legal approach will change, too.

Вопрос заключения договора между СЭВ и Общим Рынком

Л. Валки

Общий Рынок желает осуществить урегулирование отношений между двумя организациями лишь в очень узкой области, а СЭВ предлагает включить в соглашение также применение принципа наибольшего благоприятствоьания и освобождения от всякой дискриминации. Общий Рынок ссылается на то, что СЭВ не имеет в этой области соответствующей компетенции. Автор излагает, что социалистическая интеграционная организация вправе подписать любой договор, предмет

которого входит в ее компетенцию. Хотя в Уставе не определен точно объем этой компетенции, и деятельность организации до сих пор не распространялась на общие вопросы торговой политики, однако договорные пункты, предложенные со стороны СЭВ, не предусматривают какую-либо активную торговую политику СЭВ. Обеспечение наибольшего благоприятствования и прекращение дискриминации составляют такой односторонний акт, который может быть исполнен Общим Рынком и тогда, если СЭВ не применяет никакой торговой политики в отношении государств-членов.

L'accord entre la Communauté Européenne et le CAEM

L. Valki

La communauté désire que l'accord entre les deux organisations ne s'étende que sur une partie assez restreinte des rapports. Le CAEM de son part, souhaite que l'accord contienne la clause de la nation la plus favorisée et celle de l'indiscrimination. Selon l'argumentation de la Communauté Européenne, le CAEM ne possède pas la compétence nécessaire pour un accord de ce genre. L'auteur souligne que le CAEM peut signer tout accord dont l'objet relève à sa compétence. La Charte du CAEM ne comprend pas une régulation absolument précise de la compétence de l'organisation et les activités actuelles de l'organisation ne s'étendent pas encore sur la politique commerciale commune. Mais les propositions du CAEM ne demandent pas l'existence de la politique commerciale commune de la part du CAEM. L'application de la clause de la nation la plus favorisée et l'indiscrimination est un acte unilaterale et peut être appliquée sans l'existence de la politique commerciale commune du CAEM.

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Arbitration in the Council for Mutual Economic Assistance

J. JUHÁSZ
head of department
Ministry for Foreign Trade

The paper offers a review of the policies defined in article 15. of the Complex Program of the states united in the CMEA in respect of the methods of arbitration observed in their foreign trade transactions; it also discusses the antecedents, the results so far achieved and the problems still to be solved. The author deals in detail with the settlement of civil law disputes arising from the economic and scientific-technical co-operation by way of arbitration, in her discussion the author also extends to the uniform regulation of the tribunals of arbitration organized in the national chambers of commerce of the member-states of CMEA. According to the author arbitration as developed in the CMEA is a most firmly established system and the most elaborate system of arbitration in operation in world economy.

Article 15. of the Complex Program purposing the intensification and perfection of the co-operation and the advancement of the socialist economic integration of the countries of the CMEA approved by the XXVth Session of the CMEA in July 1971. declares in respect of the tribunals of arbitration operating in the foreign trade transacted between the states of the CMEA:

"9. The CMEA member-countries shall carry out co-ordinated measures for the further improvement of the functions of existing foreign trade arbitration boards in the CMEA member-countries and the procedure of examining controversial issues between the economic organisations of these countries which may arise from agreements and contracts on problems of economic, scientific and technological co-operation, dealing, in particular, with:

— the extension of the competency of national foreign trade arbitration boards placing under their jurisdiction litigation in civil law between economic organisations stemming from relations in all fields of economic, scientific and technological co-operation between the CMEA member-countries;

— expansion of the exchange of information (including exchange of arbitration rulings) between arbitration boards of the CMEA member-countries with a view to enhancing the uniform application by the arbitration boards in CMEA countries of the provisions laid down in the General Terms of Deliveries of Goods Between Organisations of the CMEA Countries (CMEA GTD 1968) and other documents regulating individual aspects of their economic, scientific and technological co-operation:

— approximation and unification of proceedings governing the consideration of suits in national arbitration boards in the Chambers of Commerce of the CMEA member-countries."

In the present study we should like to offer a review of the antecedents of these policies, the measures introduced for the achievement of the ends of these policies and the tasks still to be tackled in this scope.

The general conditions of the delivery of goods established in the CMEA since 1958[1] are obligatorily applicable to the delivery of goods between the particular member-states of CMEA and constitute the first multilaterally accepted system of norms. The instrument here referred to—although fundamentally it incorporated civil law norms[2]—defined the most important provisions associated with the settlement of legal disputes. Article XVI of this instrument includes provisions governing arbitration and, among others, státed the principle that all disputes arising from a contract or in connection with it had to be settled by way of arbitration by excluding procedure as instituted by the ordinary courts of law.

On the approval of the "General Conditions of the Delivery of Goods of 1958" the tribunals of arbitration organized in the national chambers of commerce of certain member-states of CMEA could look back to a past of some length. So, e.g., the Central Committee and the Council of People's Commissars by a resolution passed on June 17 1932 called to life as a social organization the Foreign Trade Tribunal of Arbitration organized by the side of the All-Union Chamber of Commerce of the USSR. The procedural rules of the tribunal of arbitration referred to above has been confirmed by the Presidium of the All-Union Chamber of Commerce in January 21, 1949.[3]

The procedural rules of the Tribunal of Arbitration organized by the side of the Hungarian Chamber of Commerce had been originally confirmed by the decree 1/1953 (VIII 28) of the Ministry of Home Trade, the statutes of the Bulgarian Tribunal of Foreign Trade Arbitration were defined by the decree no. 109 of February 4, 1952 of the Council of Ministers. Tribunals of arbitration of a similar nature were in operation in other states of CMEA.[4] The provisions of the General Conditions of Delivery of Goods of CMEA of 1958 relating to arbitration also influenced the provisions of other general conditions introduced in CMEA so e.g. section 47 of the General Conditions of Installation of CMEA of 1962 incorporates provisions similar to those defined in article XVI of the instrument referred to above. In conformity with section 28 of the

[1] The CMEA General Conditions of the Delivery of Goods of 1958. were introduced in Hungary by the decree 5/1958 (Kk. É. 4.) KkM sz.

[2] Cf. Szász, I.: *A KGST Általános Szállítási Feltételek* (The General Conditions of the Delivery of Goods of CMEA.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1974. p. 83.

[3] Cf. Хлестова, И. О.: *40 лет Внешнеторговой арбитражной комиссии*, Sovietskoe Gosudarstvo i Pravo, 10/1972.

[4] Cf. Szászy, I.: *Nemzetközi polgári eljárásjog* (International Law of Civil Procedure), Budapest, Közgazdasági és Jogi Könyvkiadó, 1963. pp. 628–629.

General Conditions of Technical Service of CMEA of 1962 the disputes arising from a contract or procedure associated with the settlement of legal disputes are ruled by section 65 of the General Conditions of Delivery of Goods of CMEA of 1958.

The General Conditions of Delivery of Goods of CMEA undergo a continual process of development so since 1958 the instrument was amended or supplemented on three occasions. Chapter XVI of the General Conditions of Delivery of Goods of 1958 dealing with arbitration has undergone in 1968 an amendment as regards both form and contents. Formally, the section originally figuring as the XVIth has become the XV, substantially, the amendment provides for the definition of the term of inclusion as laid down in the General Conditions of Delivery of Goods of CMEA of 1968 and so also for the language to be used in the procedure of arbitration. The provisions relating to arbitration as included in the General Conditions of Delivery of Goods of CMEA of 1968 are by virtue of section 59 of the General Conditions of Installation of the CMEA of 1973 to disputes arising from contracts coming within the purview of these conditions and so also by virtue of section 33 to disputes arising from contracts concluded under the General Conditions of Technical Assistance (Services) of CMEA of 1973.

In view of the activities and results of arbitration in foreign trade transactions in the process of drawing up the Complex Program it has become evident that arbitration within the scope of the National Chambers of Commerce have to be made subject to a revision, for the purpose of further development. In this manner within the scope of the CMEA at the end of 1969 a special organized team took up the study of the questions associated with the extention, approximation and unification of the rules of procedure of arbitration, this work was continued by the Legal Conference of CMEA.[5]

A) Agreement on the settlement of civil law disputes arising from economic and scientific-technical co-operation by way of arbitration

A number of methods could have been applied for the extension of the jurisdiction of the tribunals of arbitration operating within the chambers of commerce of CMEA. So the one solution suggested would have implied the vesting of exclusive jurisdiction in the national chambers of commerce operating in the member-states of CMEA by way of municipal provisions of law for the settlement of disputes arising from economic and scientific-technical co-operation or the settlement of these disputes by way of judicial or arbitral procedure had been entrusted to the discretion of the parties concerned. An other method suggested implied the drawing up and approval of an international convention on the jurisdiction of the tribunals of arbitration

[5] Cf. KEMPER-STROHBACH-WAGNER: *Die Allgemeinen Lieferbedingungen des RGW 1968 in der Spruchpraxis sozialistischer Außenhandelsschiedsgerichte.* (Kommentar) Berlin, 1975. p. 395.

organized within the chambers of commerce.[6] The member-states of CMEA decided in favour of this second method and applied it and on the 26 of May of 1972 signed the agreement on the "Settlement of Civil Law Disputes Arising from Economic and Scientific-Technical Co-operation by way of Arbitration"; this agreement was promulgated in Hungary as law-decree no. 23 of 1973.[7]

This instrument is often referred to as an Agreement on Jurisdiction[8] because its principle purpose is to bring under regulation the jurisdiction of tribunals of arbitration organized by the side of national chambers of commerce of the member-states of CMEA; it defined the subjective and objective scope of disputes for the settlement of which exclusive jurisdiction has been vested in the tribunals of arbitration referred to before. The exclusive jurisdiction of the tribunals of arbitration, at the same time, implies that the parties concerned are not authorized to stipulate the jurisdiction of the ordinary courts of law for the settlement of civil law disputes arising from the Agreement referred to before. An agreement to this end would be null and void. Thus, the agreements have an effect not only in international relations but also in domestic ones in so far as they bring under regulation the division of jurisdiction between the ordinary courts of law and that of the tribunals of arbitration organized within the respective chambers of commerce.[9]

The statement suggests itself therefore that arbitration as regulated by the Agreement must be regarded as one substantially departing from otherwise internationally usual agreements of this kind. Namely, while in general it is characteristic of the institution of arbitration that the parties have recours to it instead of the ordinary courts of law by their own free will and it is also left to the parties to elect the tribunal of arbitration to which their case should be referred, the present Agreement has adopted the system of institutions as laid down in the General Conditions of Delivery of Goods of CMEA, accordingly, within a certain scope instead of on the will of the parties the jurisdiction of the tribunals of arbitration relies on provisions of law and, at the same time, the scope of tribunals of arbitration to which the case may be referred has also been defined.[10] At the same time, the fundamental criteria by which the members of the tribunals of arbitration or the single

[6] Cf. Szász, I.: *Új szakasz a KGST-országok jogi együttműködésében* (New phase in the legal cooperation of the CMEA countries), Magyar Jog, 9/1970.

[7] *A Kölcsönös Gazdasági Segítség Tanácsának Jogi Dokumentumai* (The Legal Instruments of the Council for Mutual Economic Assistance), ed. Bán, T. Budapest, Közgazdasági és Jogi Könyvkiadó, 1978. pp. 634–640.

[8] Cf. Névai, L.: *A választottbírósági szabályzatok és a polgári perrendtartások viszonya a KGST-tagországokban — különös tekintettel Magyarországra* (The relationship between the rules of arbitration and the Codes of civil procedures in the CMEA countries—with special regard to Hungary), Jogtudományi Közlöny, 1–2/1974; id.: *A szocialista külkereskedelmi választottbíráskodás fejlődésének újabb vonásai* (New traits in the development of socialist foreign trade arbitration) Külgazdaság, 3/1976.; Strohbach, H.: *Schiedsgerichtsbarkeit und Justiz.* Neue Justiz, 13/1973.

[9] Strohbach, op. cit.

[10] Cf. Szász, I., op. cit. (note no. 3.) pp. 308–309.

arbitrator may be appointed by the parties or whether there lies appeal against the award are uniform with those established in international arbitration.

The Agreement defines the scope of disputes to be referred to arbitration in two approximation. So the Agreement provides first that all legal disputes arising from contracts made within the scope of economic and scientific-technical co-operation of the signatories or from other civil law relations are settled by way of arbitration (§ 1. article I.); by way of examples the Agreement enumerates the most typical contractual relationships (§ 2. Article I.). Secondly, the Agreement states that the disputes arising from contractual and other economic relations have to be such as coming about between the economic organizations of the countries concerned (§ 1. article I.). The Agreement in like manner by way of examples enumerates some of the organizations coming within the purview of arbitration (§ 3. article I.).[11]

In connection with the provisions included in § 1. of Article I. questions of interpretation are likely to arise. Accordingly, there are opinions which call into doubt whether the provision of this article could be interpreted so as disputes arising from relations not covered by the Agreement—e.g. from the collision of ships—could be referred in all cases to arbitration i.e. to the scope of operation of the Agreement. Namely, in accordance with these opinions if the provision compared to other provisions of the Agreement or to other general conditions of CMEA the conclusion may be drawn that the opinion referred to above amounts to an extensive interpretation of the Agreement. The Agreement primarily applies to disputes arising from contracts under economic and scientific-technical co-operation and so the scope of the Agreement does not extend to disputes expressly relaying on delictual claims.[12] The present author for her part is of the opinion, that if it is borne in mind that § 1. Article I., makes mention of "all legal disputes arising from any other civil law relationship" and secondly, that according to § 2. of article I., that in addition to contractual relations attention has to be given to any other civil law relation arising from economic and scientific-technical co-operation that if the legal disputes of a non-contractual nature arising from the economic and scientific-technical relationships of the signatories of the present Agreement come in all cases within the jurisdiction of the present Agreement. In Hungarian judicial practice a similar standpoint has become established. According to the position 1/1977 adopted by the Presidial Conference of Civil Law College of the Supreme Court of Hungary dealing with the application of the

[11] Cf. RÉVAI, T.: *Egyezmény kizárólagos választottbirósági hatáskörről a KGST-tagállamok szervezetei közötti polgári jogi vitákban* (Agreement on the exclusive jurisdiction of the tribunals of arbitration in civil law disputes between the organizations of the CMEA countries), Külgazdaság, 8/1972.; NÉVAI, L.—RÉVAI, T.: *A KGST-tagállamok kamarai választottbíróságainak hatásköréről* (On the jurisdiction of the tribunals of arbitration of the chambers of commerce of the CMEA countries), Magyar Jog, 12/1972.

[12] Cf. STROHBACH, H.: *Konvention über die schiedsgerichtliche Entscheidung von Zivilrechtsstreitigkeiten, die sich aus Beziehungen der wirtschaftlichen und wissenschaftlich-technischen Zusammenarbeit ergeben*, Sozialistische Außenwirtschaft, 7/1972.

Agreement[13] legal disputes arising from damage caused in non-contractual relations have to be considered legal disputes arising from civil law relations to be referred to arbitration provided that all other conditions of the application of the Agreement are present.

At the same time, in certain cases difficulties may have to be confronted at determining whether the activities in question may be considered such as coming within the province of economic and scientific-technical co-operation. So e.g. if vessels flying the flag of countries signatories to the Agreement collide on the Danube in the course of delivery of goods of the signatories then legal disputes so arising must presumably considered such as coming within the scope of operation of the Agreement. On the other hand, if the accident occurs in the course of passenger transport the claims to damages arising from the collision would come within the jurisdiction of ordinary courts of law. Provided this interpretation of the provisions of the Agreement may be considered the correct one, the question may arise whether the division of jurisdiction in this manner may be accepted as justified.

The Agreement exempts the settlement of definite problems from the jurisdiction of arbitration. Thus, in conformity with § 1. of article III. obligation of the making of contracts or the acceptation of certain terms of a contract does not come within the jurisdiction of the tribunals of arbitration. The reason of this provision is that in the practice of the countries of CMEA already before the coming into operation of the Agreement it was a generally established principle that contract-making between the economic organizations of the particular countries could not be enforced by way of arbitration. The primary reason explaining this policy is that long-term or annual inter-state (or intergovernmental) agreements including schedule of goods come within the scope of public international law and so from such agreements no obligations of civil law contract making do immediate arise as a consequence. There are opinions according to which one of the consequences of the want of a bilaterally obligatory adherence to the economic plan contract-making cannot be enforced by way of arbitration.[14]

This provision of § 1. of Article III., however, does not affect the scope of jurisdiction of tribunal of arbitration to proceed in claims to damages or penalty arising from the violation of the obligation of contract-making as laid down in the *pactum de contrahendo*. Thus, e.g. in the case of contracts for the specialization of production and co-operation coming within the scope of operation of the General Conditions of Specialization of Production and Co-operation as Existing between the member-states of CMEA[15] either party desists from contracting on the delivery of

[13] The standpoint referred to above has been published in number 6/1977. pp. 439–440. of the Hungarian Court Decisions.

[14] Розенберг, М. Г.: *Регулирование поставок между организациями стран-членов СЭВ.* Sovietskoe Gosudarstvo i Pravo, 7/1975.

[15] The General Conditions for the Specialization of Production and Co-operation between the organizations of the countries represented in CMEA have been promulgated in Hungary by the law-decree no. 24. of 1979.

goods, the other party cannot apply to the tribunal of arbitration to bring about a contract or the obligation of the other party to negotiate a contract[16] still the party in question may in conformity with § 4. of section 26. of the Agreement referred to above apply to the tribunal of arbitration to decree the payment of penalty.

Opinions have come to the fore[17] which in view of the fact that although the Agreement referred to before has come into operation after the signature of the CMEA Convention provides in its section 53. that all diputes arising from the contract of specialization or in association with it have to be determined by the tribunal of arbitration organized by the side of the chamber of commerce of the dependent country or of a third country call into doubt whether the provision included in § 1. of article III. of the Convention could be followed in respect of contracts of specialization. In the opinion of the present author from the fact that in accordance with section 53. of the Agreement referred to before the disputes in question have to be determined in conformity with the CMEA Convention, the conclusion may be drawn that in the event of disputes arising from contracts of specialization or in association with them the fundamental Convention as a whole must be regarded as mandatory and so also the provision included in § 1. of article III. of the Agreement. In this connection opinions have become manifest that in view of the Agreement coming to operation in 1972. whether there was any need to take up provisions for the settlement of disputes in the CMEA Agreement for Specialization and Co-operation negotiated in 1979.[18] Although the present author considers this opinion theoretically properly founded for practical purposes the solution adopted by the CMEA Agreement for Specialization appears to be holding its own, this is the case because the Agreement referred to before calls forth the attention of those dealing with it to the Agreement governing also the CMEA Agreement of Specialization.

In addition to § 1. of Article III. of the Agreement also Article VI. deals with the kinds of legal disputes to which the Agreement cannot be applied. So § 1. of Article VI. of the Agreement exempts under the operation of the Agreement legal disputes referred to by bilateral or multilateral agreements signed by the signatories earlier to the jurisdiction of definite organs. Provisions of this kind have been taken up in the Warsaw Agreement on Air Transport of Goods and in Agreement on International Transport of Goods by Railway and Agreement on International Transport of Passengers by Railway[19].

In conformity with § 2. of Article VI. the Agreement cannot be applied to civil law disputes which at the time of the signature of the Agreement municipal legislation

[16] Cf. JUHÁSZ J.: *A KGST-tagországok szervezetei közötti termelés-szakosítás és kooperáció Általános Feltételei* (The General Conditions for the Specialization of Production and Co-operation between the organizations of the member-states of CMEA), Jogtudományi Közlöny, 10/1979.

[17] Cf. BAUER, M.: joint Report to BÁN, T.'s: *Lecture on the legal aspects and actual problems of the Complex Program of the Council for Mutual Economic Assistance* given in the 9th Conference of the Hungarian Lawyers' Association (M. S.) p. 460.

[18] BAUER, op. cit.

[19] Cf. STROHBACH, op. cit.

has referred to the exclusive jurisdiction of a municipal court of law or any other municipal authority. The joint communications no. 306/1973. (IK. 11.) IM–KkM and no. 302/1975. (IK. 4.) IM–KkM inform of the civil law disputes whose determination come within the exclusive jurisdiction of the organs referred to above. Although the sphere of disputes is not congruous still on hand of reports as defined by the communications mentioned the statement suggests itself that in general cases associated with patents, trade marks, real estates by virtue of the provisions of § 2. Article VI. of the Agreement do not come within the scope of arbitration.

In conformity with Article IV. the awards of arbitration and settlements and accords approved by the tribunal of arbitration must be regarded as definitive and obligatory. These have to be considered as recognized without any further procedure and can be enforced in any signatory countries in the same way as the enforceable decisions of the municipal judiciary of the country where they have been passed. In this connection it should be borne in mind that in the majority of cases action is instituted in the tribunal of arbitration organized by the side of the chamber of commerce of the defendant's country, the awards pronounced against the defendant are in general pronounced by the tribunals of arbitration of the country of performance. From this principle cases are exempted e.g. when in respect of counter-claims arising from the same relationship in respect of which action has been instituted and claims to inclusion the tribunal of arbitration determining the action proceeds or when by agreement of the parties the case is referred to arbitration in a third country.

The provision taken up in Article IV. which for the purpose of enforcement guarantees the same force to awards of arbitration as to the enforceable decisions of the ordinary coutry of law departs from the provisions of the New York Convention on "The Recognition and Enforcement of the Awards of Foreign Tribunals of Arbitration" of June 10. 1958.[20] According to this convention for the recognition and enforcement of the awards coming within the scope of the New York Convention no fees, costs and conditions substantially higher or more rigorous than those usual in municipal arbitration can be decreed. Hence, the New York Convention for the purpose of the enforcement of the awards of foreign tribunals of arbitration accepts the conditions of the enforcement of the awards of arbitration of the country of performance as mandatory and not those specified for the enforcement of the decisions of the ordinary courts of law of the respective country.

As is known for want of a mandatory convention or treaty the legislative and judicial practice of the particular countries in operation for the enforcement of the awards of foreign arbitration present substantial differences in respect of the enforceability of the awards referred to above in a sense that these awards should be enforceable in conformity with the decisions of the municipal arbitration or foreign

[20] In Hungary the Agreement was promulgated by the law-decree no. 25. of 1962.

courts or should be made dependent on the results of an action for performance or following upon the supervision of the case in its substance.[21]

Article V. of the Agreement brings under regulation the causes for which the enforcement of an award can be denied. Among these the article quotes the cases when the awards have been pronounced in contradiction to the rules governing jurisdiction, or the injured party produces evidence to the effect that owing to the infringement of the rules of procedure in arbitration or circumstances beyond his control he was unable to defend his rights, or when the award has been rescinded or its enforceability suspended on the grounds of municipal legislation of the country where the award has been brought. The statement can therefore be made, that Article V. of the Agreement brings under regulation the causes of the denial of the enforcement of an award in a manner very much similar to that laid down in the provisions of Article V. of the mentioned New York Convention or in Article IX. of the Geneva Convention on International Commercial Arbitration of April 21. 1961.[22]

In view of the circumstance that the provisions of municipal legislation of the signatories substantially depart in respect of the grounds on which an award may be rescinded or its enforcement suspended, within the Legal Conference the conditions of the introduction of a uniform regulation of the method has been made subject to a study so far, however, no settlement has been reached.

B) The Uniform Statutes of the tribunals of arbitration to be organized by the side of the chambers of commerce of the CMEA states

In the same way the Legal Conference of the CMEA discussed the method of tne "Uniform Statutes of the tribunals of arbitration to be organized by the side of the chambers of commerce of the signatories"[23] and as an appendix the schedule "of the Costs and fees of arbitration and the costs to be borne by the parties".

In the 66. Session the Executive Committee of CMEA (26—28. February 1974.) brought forward a recommendation according to which the provisions of the uniform procedural rules of arbitration applicable to disputes between the economic organizations of the CMEA countries should be supplementable by further provisions. In respect of the legal disputes between subjects-at-law of the CMEA countries, however, the supplements cannot conflict with the uniform statutes.

The instrument referred to above incorporates detailed regulations regarding the organization and operation of arbitration and arbitral procedure. On this ground the procedural rules of the tribunals of arbitration organized by the side of the chambers of commerce of the signatory states have then been drawn up. The statutes of

[21] For details cf. Szászy, op. cit. pp. 670–671.

[22] In Hungary promulgated by the law-decree no. 8. of 1964.

[23] Cf. op. cit. (note no. 7.) pp. 641–659.

the tribunals of arbitration have been drawn up with due regard to the uniform statutes yet not as a verbatim translation of these. According to certain opinions, the departures are of minor importance only,[24] still views have come forward that some of these are quite substantial.[25]

C) Extension of the exchange of information

The carrying out of the exchange of information between the organs of arbitration existing in the CMEA countries as laid down in the Complex Program is of outstanding importance for both those applying the law and those engaged in the further development of the instruments current in the practice of the CMEA countries.

Namely, the acquaintance with the practice followed by arbitration in the particular countries may be apt to advance the establishment of a uniform practice in the administration of law and may also have an effect on the policy practiced by the organs of the CMEA countries concerned in contract-making and the performance of the contracts further on the attitude of the parties concerned within the scope of arbitral procedure in making good their rights and performance of their obligation.[26]

For the purpose of the development of normative instruments used in the practice of the CMEA countries is of importance because the acquaintance with the methods of interpretation established in arbitral procedure may help in formulating suggestions for an amendment of the instruments in question.

The differences in arbitral practice may be traced back to a number of reasons. To the reasons which in certain cases elicit a difference in interpretation of the municipal provisions of law further ones may crop up in the event of internationally approved mandatory normative instruments. Reasons of this type may be come manifest e.g. in cases when in certain cases the provisions of "The General Conditions of Delivery of Goods of CMEA" incorporates legal concepts which in the legal assistance of the particular CMEA countries differ by their contents (e.g. discounts). It is for a long time already a moot question in both literature and legal practice whether if "The General Conditions of Delivery of Goods of CMEA" fail to make mention of certain institutions of law—as was the case in respect of unilateral withdrawal from the contract in the event of faulty performance until 1975.—the interpretation is admissible that the buyer party cannot even bring forward a claim or whether on the ground of section 72. of "The General Conditions of Delivery of Goods of CMEA of

[24] Varró, J.: *Bevezető, Külkereskedelmi jogi dokumentációk* (Introductory, Foreign trade legal documentation), 10/1978. pp. 3–4. (Edited by International Legal Bureau of the Hungarian Chamber of Commerce).

[25] Cf. Révai, T.: *Egységes Kamarai Választottbírósági Eljárási Szabályzat a KGST-tagállamaiban* (Unified Statutes of the Procedure of Arbitration in the Chambers of Commerce in the member-states of CMEA), Külgazdaság, 6/1980.

[26] Cf. Братусь, С. Н.: *Арбитраж и международное экономическое сотрудничество*, Sovietskaya Yusticiya, 1/1973.

1958." or section 110. of "The General Conditions of 1968." the law of the seller should be applied.[27]

This problem is closely associated with the policy to be observed in cases of a gap in the law. The opinions are divided, whether—setting out from the international character of the general conditions of goods of CMEA-in such cases recours should be had to analogy in the first place for the settlement of such problems, or whether the background substantive law should be applied.[28] As the matter of course the uniformity of the application of law may be best advanced by the unequivocal and detailed formulation of the applicable instrument. To this end at the formulation of "The General Conditions of Delivery of Goods of CMEA" of 1968. and their amendment and supplementation in 1975. and 1979. the legislators have attended to the problems apt to emerge in the course of the application of law. In view of this in "The General Conditions of 1968." section 72. of the General Conditions of 1958. was amended; this section provided for the application of the substantive law of the seller, then in 1975 the instrument was supplemented by section 2/A on withdrawal from the contract. For the purpose of the further development of the instrument the Legal Conference of CMEA studies the practice followed at the application of the General Conditions of Delivery of Goods of CMEA.

Also the biannual conference of umpires of the tribunals of arbitration organized by the side of the chambers of commerce of the CMEA countries has as its duty to advance the uniformity of the administration of justice. These conferences cannot bring forward obligatory recommendations, their purpose is consultation and the exchange of opinions.[29] At the same time, the opinions given expression in these conferences in general convey an idea of the practice followed in arbitration by the particular states, the positions adopted in the course of the exchange of opinions are in general observed in the procedure of arbitration established in the particular countries.[30]

In view of what has been set forth it is absolutely essential for those in charge of the application of law to become acquainted with the results of the analysis of the practice of arbitration in the particular countries by these conferences. To this end in Hungary in the Appendix to the periodical "Külgazdaság" analyses are published of concrete awards of the discussions of these conferences.[31]

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[27] Ruzicka, J.: *Částečná novellizace Všeobecných podmínek dodávek RVHP* (Partial modification of the General Conditions of Delivery of Goods of CMEA), Právni zpravodaj 1–3/1976.

[28] For details cf. Kemper-Strohbach-Wagner, op. cit. pp. 62. et seq.; Kemper, M.: *Grundsätze der Auslegung und Anwendung der ALB/RGW 1968*. Sozialistische Außenwirtschaft, 4/1972.; Розенберг, op. cit.

[29] Cf. Révai, op. cit. (note no. 25.)

[30] Cf. Kemper-Strohbach-Wagner, op. cit. p. 390.

[31] Révai, T.: *A KGST-tagállamokban szervezett kamarai választottbíróságok VI. konferenciájának állásfoglalása a választottbírósági gyakorlat egyes időszerű kérdéseiben* (The standpoint of the VIth Conference of the Tribunals of Arbitration organized by the Chambers of Commerce of the CMEA countries in certain timely problems of arbitration), Külgazdaság, 1/1972; Névai, L.: *A szocialista külkereskedelmi választottbíráskodás fejlődésének újabb vonásai* (Recent traits in the development of arbitration in socialist foreign trade), Külgazdaság, 3/1976.

Remarkable progress has been made in the achievement of the ends defined by the Complex Program for further development of the institutions of arbitration. Comprehensive and effective regulation is characteristic of the method of settlement of disputes arising in co-operation on an enterprisal level.[32] In this way a system of arbitration has become established in the CMEA countries which may for its high degree of perfection be considered the most advanced in world-wide arbitration.

Naturally, the thesis is valid also for arbitration whether on the international plane the particular institutions of law are open for further development dependent on to what extent the parties concerned are interested in the uniform settlement of certain problems or to what extent further development is substantiated by experience accumulated in the course of application of the particular instruments. Opinions have come to the fore which emphasize the need for the further development of provisions relating to arbitration in order that problems associated with arbitration so, in particular, the setting aside of awards[33], the institution of intervention, the conditions of litispendence, etc. might be settled in a uniform manner.[34]

In view of all what has been set forth in the course of the following years within the scope of the Legal Conference of CMEA the question of the introduction of uniform statutes of arbitration in CMEA and of the tribunals of arbitration organized by the side of the chambers of commerce of the particular countries will come to be put on the agenda, for the purpose of the further development of the application of the instruments in question in the practice observed in the particular countries.

Внешнеторговый арбитраж в СЭВ

Й. Юхас

В статье рассматриваются цели, поставленные в 15 разделе Комплексной Программы в связи с внешнеторговыми арбитражными судами стран-членов СЭВ, изучается их предистория, далее достигнутые результаты и решимые задачи.

Автор занимается «Конвенцией о разрешении арбитражным путем гражданско-правовых споров, вытекающих из отношений экономического и научно-технического сотрудничества», а также единообразным регламентом арбитражных судов при торговых палатах стран-членов СЭВ. По мнению автора институционная система арбитражных судов стран-членов СЭВ уже сложилась и является самой разработанной системой международных арбитражей мира.

[32] Cf. Szász, I.: *A KGST integráció jogi mechanizmusa* (The legal mechanism of the CMEA integration), Jogtudományi Közlöny, 4/1979.

[33] Cf. Kemper-Strohbach-Wagner, op. cit. pp. 396. and 423.

[34] Cf. Révai, op. cit. (note no. 25.)

L'arbitrage commercial dans le CAEM

J. JUHÁSZ

L'auteur, au début, donne un aperçu des dispositions du Programme Complexe relatives à l'activité des arbitrages commerciaux, leur antécédents et les problèmes qui demandent solution. Elle analyse la Convention adopté en 1972 sur le règlement des litiges du droit civil résultant des activités de coopération économique scientifico-technique ainsi que le statut et la procédure uniformes des arbitrages organisés auprès des chambres de commerce des pays-membres du CAEM. L'auteur souligne que le systême d'arbitrage des pays socialistes est déjà complet et qu'il est le systême de l'arbitrage le plus évolué dans le monde.

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Le rôle du système de droit des Etats-membres dans le mécanisme juridique du CAEM

T. BÁN
directeur général
Ministère de la Justice

Parmi les problèmes juridiques du fonctionnement du Conseil d'Assistance Économique Mutuelle, l'auteur traite dans son article du rôle du système des normes juridiques dans l'intégration économique. De son avis, il faut décider dès le départ de chaque processus d'intégration économique : lequel parmi les mécanismes ou techniques juridiques possibles sera développé. Selon l'auteur, le CAEM a opté pour une double voie de la formation de droit : le système qui jouera le rôle de l'appareil juridique de la coopération économique, scientifique et technique sera construit graduellement en résultat des processus de création du droit partant d'une part du côté de la communauté, venant d'autre part de ceux déroulant au niveau du système juridique national des Etats-membres.

L'auteur s'occupe d'abord des processus qui se déroulent du côté de communauté. Il démontre qu'au sein du CAEM, dans la plupart des cas, ce ne sont que les phases quoique très importantes, mais seulement préparatoires du processus codificateur qui se déroulent dans l'organisation d'intégration elle-même. En effet lorsqu' une recommandation est adoptée dans les organes respectifs du CAEM en résultat du travail collectif des représentants des Etats-membres délégués dans ces organes là alors — dans un certain degré malgré l'apparence, — le processus de décision, de codification n'est pas encore terminé. Il ressort des principes de fonctionnement du CAEM que la recommandation ne devient entièrement valable que si les organes compétents des Etats-membres en prennent acte et la notifient dans les 60 jours ce qui est un acte semblable, à plusieurs égards, à la ratification des traités internationaux. Conformément à cela une partie importante du système des normes élaborées collectivement ne peut pas être considérée comme étant des normes CAEM, car ces règles juridiques, en dernière analyse apparaissent dans le droit national des Etats-membres. Cette activité de crèation du droit qui commence au niveau de la communauté se termine à celui des Etats-membres, a comme spécialité qu'en résultat de ce travail dans tous les Etats-membres — tout au moins dans ceux qui y intéressés participent à la prise de décision — une règle identique apparait dans le système juridique national, pour régler une question donnée. Au fond cela est une unification, pour l'essentiel identique à la technique employée de plus en plus souvent dans les diverses régions du monde ou universellement, at qui a comme résultat que des lois uniformes sont élaborées pour règlementer certaines questions.

Par la suite, l'auteur s'occupe de l'autre aspect de la création du droit du CAEM. C'est l'élimination des différences existantes dans les systèmes juridiques nationaux par la voie du rapprochement graduel des droits. Actuellement ceci consiste à examiner les questions données d'une manière comparative, pour préciser les différences. Étant donné qu'avant la fin de la seconde guerre mondiale, les Etats-membres du CAEM s'étaient développés très différemment, et que leur tradition juridique, comme leur mentalité diffèrent encore assez aujourd'hui même, d'autre part, parce que malgré le développement socialiste unitaire, leur droit se développe différemment, — à côté de la parenté évidente — l'Auteur pense qu' est plus simple de mettre l' accent, dans le CAEM, sur la méthode d'unification, car dans la période

actuelle nous pouvons en attendre des résultats plus rapides, que si nous aspirions à ce que les législations nationales des Etats-membres, partant, pour ainsi dire, de leurs propres initiatives, œuvrent à élaborer des règles juridiques identiques ou très semblables.

1. Les expériences accumulées au cours des décennies écoulées dans les divers domaines de l'intégration économique socialiste permettent de formuler des conclusions générales à propos du rôle du droit dans le CAEM. Ce qui relève l'importance de cette idée, c'est qu'il y a 10 ans, le Conseil d'Assistance Economique Mutuelle a créé la Conférence Juridique, organe spécialisé du CAEM pour promouvoir l'activité juridique.

Si importants que soient les facteurs qui mettent à présent en vedette le travail juridique accompli dans le CAEM nous ne pourrions pas nous charger de nous étendre sur tous les aspects importants de cette activité. Même si les difficultés existantes, à côté des résultats remarquables, ont ralenti et ralentissent encore, la marche du travail juridique, il est indéniable — qu'il s'agisse du travail juridique dans le CAEM en général, ou de l'activité juridique déployée dans les cadres de la Conférence Juridique en particulier, — que le mécanisme juridique du fonctionnement du CAEM est devenu de nos jours trop complexe, trop étendu et divergent dans le sens qualitatif et quantitatif qu'on puisse en faire un tour d'horizon d'un seul élan.

C'est pourquoi je tâcherai dans la suite de traiter d'un groupe de questions déterminé. Alors que l' actualité de ce sujet — le rôle du système juridique national des Etats-membres dans le CAEM — grandit au sein du CAEM, celui-ci a en même temps un caractère assez général pour retenir l'attention même de ceux qui ne s'intéressent pas qu'au travail juridique du CAEM.

Bien que quelques monographies et articles aient été consacrés au phénomène qu'on peut déterminer le mieux comme problèmes du rapport entre les prescriptions juridiques créées dans le cadres de l'organisation d'intégration économique donnée des Etats y groupés d'une port et les règles de droit intérieures des mêmes Etats d'autre part, je suis sûr que l'examen de ces rapports fut fait en premier lieu d'une manière généralisée et abstraite, sans avoir encore été approfondi comme il faut, à propos des corrélations concrètes de l'intégration économique qui se déroule dans le CAEM. A mon avis cet examen a de l'actualité, parce que dans la mesure où l'intégration économique socialiste se réalise plus complètement, surgiront, dans les plus divers domaines du travail administratif, de chaque pays, des problèmes difficiles à résoudre sans l'analyse du rapport mentionné — donc celui des normes élaborées au sein du CAEM et du droit intérieur des Etats-membres.

2. C'est une expérience générale remontent aux temps anciens que le droit n'est point la juxtaposition de règles particulières, l'entassement de prescriptions prises sans égard l'une pour l'autre, mais un système dont l'efficacité est d'autant plus intense que les parties de ce système, les diverses règles juridiques s'enchaînent. La science juridique s'efforçait toujours d'élaborer la système le plus efficace des règles juridiques.

Au cours des XIX^{e} et XX^{e} siècles, dans les divers Etats se sont effectivement développés les systèmes généralement acceptés de la mise ou point des droits. Ces

systèmes peuvent bien différer l'un de l'autre dans les pays de divers régimes économiques et sociaux, en fonction des diverses cultures, traditions, mentalités juridiques, mais en dépit de cela, ils peuvent fonctionner et être efficaces.

Cependant, l'humanité entre de nos jours dans une période où elle rencontre de dimensions nouvelles par rapport aux coulisses de la scéne son histoire précédente. C'est ainsi sous beaucoup de rapports des sciences, de la vie sociale et notamment dans le domaine des Etats et du droit.

Dans le cas des pays européens — y compris les pays socialistes d'Europe orientale — cette nouvelle dimension commença de se former visiblement dans la période suivant la seconde guerre mondiale. On peut résumer le mieux ce phénomène en mentionnant qu'à côté des Etats, même les groupements politiques, militaires, économiques ou autres, formés par les Etats, commencèrent de jouer un rôle grandissant, et comme sous certains aspects ces groupements commençaient à se comporter à la manière ou d'une manière analogue des Etats, un rôle de plus en plus important a échu et échoit aux prescriptions faires par ces formations, prescriptions qu'il faut considérer, à titre de simplification, de même comme du droit. Nous nous trouvons donc face à une situation qui est plus complexe, en la comparant à la formule précédente plus simple où les systèmes logiques des droits exerçaient leurs effets à l'intérieur des frontières de chacun des Etats. Ne tenant compte que du degré de complexité le plus bas de cette nouvelle situation, il est déjà évident qu'à présent quant à la solution de certains problèmes, à côté des prescriptions juridiques en vigueur à l'intérieur de l'Etat, il peut entrer en ligne de compte l'application des règles adoptées concernant des problèmes analogues par le groupe d'Etats ou l'organisation internationale dont l'Etat en question fait partie. Mais la vie produit toujours des situations d'un degré de complexité plus élevé, puisqu'elle soulève non seulement le rapport des prescriptions juridiques du groupe d'Etats avec le droit intérieur de chacun des Etats-membres, mais elle pose aussi la question des rapports entre les systèmes juridiques des Etats-membres eu égard à tel ou tel caractèristique du système juridique en vigueur dans le cadre du groupement d'Etats ou de l'organisation internationale. De toute évidence se pose également la question du rapport du système juridique du groupe d'Etats ou de l'organisation internationale avec les Etats ne faisant pas partie du groupement et même si ceux-ci forment un groupe eux-mêmes, ayant un mécanisme juridique particulier, aussi avec ce groupe d'Etats ou organisation.

Si nous y ajoutons que le "droit" intégré des groupes d'Etats en général ne s'étend pas à tous les problèmes soulevés par le fonctionnement du groupe, par la nature des choses, il peut y avoir des questions dans les cas desquelles, il y a du parallélisme entre le droit intérieur du groupe d'Etats et celui des Etats-membres, mais il peut y avoir de telles où il n'y a de prescription qu'au niveau de l'Etat-membre ou seulement à celui de la communauté, alors il devient encore plus clair qu'à présent le développement et le fonctionnement du système ne peut plus être résolu à l'intérieur de l'Etat. Comme l'avance de l'intégration économique socialiste qui se fait dans le CAEM, a exigé de tout le mécanisme de la coopération que les divers éléments de celle-

ci — d'économie politique, monétaires et financiers, de planification, facteurs institutionnels — se composent en un système logique, bien formulé ayant égard l'un à l'autre, de même le mécanisme juridique qui fait partie de ce système doit disposer des conditions qui permettent de créer un ensemble pret à fonctionner. Il faut en tenir compte dans l'activité juridique au sein du CAEM.

Cependant, comment peut-on assurer l'harmonie nécessaire entre les prescriptions juridiques intervenues à de divers échelons — par exemple à ceux d'Etat-membre et de communauté?

Jusqu'ici j'ai posé les questions en général, de façon qu'elles pouvaient concerner des groupements universels ou régionaux, des organisations, en outre des formations militaires, politiques, culturelles ou autres. Or, je voudrais aborder maintenant le sujet examiné sous une forme concrète. Je voudrais voir quelle est la réponse qu'on peut donner dans le cas du CAEM à la question de savoir sont quels sont les rapports entre les prescriptions de type juridique (on leur donne des noms divers, comme : actes normatifs, recommandations, résolutions etc. mais je pense qu'à titre de simplification nous pouvons les appeler règles juridiques du CAEM) créées à l'échelon de l'organisation de l'intégration économique socialiste, du Conseil d'Assistance Économique Mutuelle, et le système juridique intérieur des Etats-membres.

De telles enquêtes sont en général introduites par des raisonnements comparatifs l'on met en parallèle de la façon la plus marquante les deux organisations d'intégration économique les plus importantes de l'Europe: le CAEM et la CEE (le Marché Commun). Ce serait une solution tentante, mais j'estime que le lecteur connait ou lui sont accessibles bon nombre d'analyses concernant le mécanisme juridique du Marché Commun. C'est pourquoi, bien qu'en général l'image soit moins frappante si nous analysons quelque chose en soi-même, je voudrais quand-même consacrer toute mon attention au mécanisme juridique qui caractérise le Conseil d'Assistance Économique Mutuelle.

3. Les documents, statuts, déclarations qui déterminent — ou desquels on peut déduire — le rapport entre les règles juridiques formulées par les organes du CAEM et les dispositions qui constituent le système juridique intérieur des Etats-membres, sont assez laconiques.

Je voudrais distinguer deux types de ces orientations : le premier type consiste aux déclarations politiques qui déterminent le caractère, la nature du CAEM, comme par exemple la déclaration du fait que la Conseil d'Assistance Économique Mutuelle est une organisation d'Etats qui conservent entièrement leur souveraineté même après être devenus membres de l'organisation. L'indépendance de ces Etats et le respect des intérêts nationaux reposent sur les principes de la non-ingérence dans les affaires intérieures des pays, de l'égalité en droits et de l'assistance mutuelle fraternelle. Il en ressort que d'après les règles en vigueur dans le CAEM, l'Etat-membre ne peut pas se trouver en état de dépendance de l'organisation créée, autrement dit l'organisation n'a de priorité à aucun égard vis-à-vis des Etats-membres et deux ou plusieurs Etats ne peuvent pas non plus parvenir, à l'aide de l'organisation, à saisir le pouvoir sur les

autres Etats-membres. Au deuxième type de groupes de règles appartiennent les dispositions formulées sous une forme plus concrète, qui réglementent l'ordre de prises de décisions du CAEM et lesquelles assurent — comme suite directe des thèses de caractère politique mentionnées plus haut — que le pays, adhéré comme membre, puisse sauvegarder la totalité de sa souveraineté aussi en tant que membre, c'est-à-dire que l'organisation — ou un groupe des Etats-membres — ne peut pas prendre une résolution malgré la volonté d'un Etat donné qui oblige aussi ce dernier Etat.

Il faudrait remarquer, plutôt entre parenthèses, que ce qui précède représente les faits de la réalité d'aujourd'hui, sous forme d'images fixes. Néanmoins, cette constatation ne signifie point que dans la phase actuelle de l'évolution la situation dépeinte soit entièrement satisfaisante et qu'on ne cherche pas les possibilités à l'intéreur du CAEM qui puissent assurer une plus grande mobilité à l'intégration qui se fait dans le cadre de l'organisation. Mais, en attachant notre attention pour un instant à un autre rapport, elle ne signifie non plus qu'on puisse tirer des conclusions concernant la capacité juridique du CAEM qu'on a tiré à l'Occident, sur la base des rapports entre les Etats-membres et l'organisation, ou bien de ceux des Etats-membres entre eux. Il est évident que le rapport des Etats-membres avec l'organisation et la capacité juridique de celle-ci sont des questions qu'on peut séparer l'une de l'autre.

Pour en revenir à la ligne principale de notre raisonnement, nous pouvons d'ores et déjà constater que le CAEM ne peut pas être considéré comme un groupe d'Etats qui, dans ses rapports d'association, met à priori les règles juridiques établies en commun au-dessus des dispositions intérieures des Etats-membres. Or, si les normes juridiques établies au niveau du CAEM et les lois intérieures des Etats-membres ne sont pas caractérisées par une hiérarchie et subordination, quel est le rapport entre ces deux sortes de droit?

La réponse n'est pas facile et il est même impossible de donner une réponse qui soit valable sous tous les rapports. Essayons donc d'examiner quelques groupes de cas en vue de donner un fondement à une réponse acceptable.

Voyons tout d'abord la recommandation, comme la forme la plus fréquente donc la plus importante des décisions sur le fond appliquées dans le CAEM.

Bien qu'on ait l'habitude de dire que la recommandation n'est pas encore une décision, donc elle n'a pas de caractère juridique et ne signifie qu'un engagement de la part des Etats-membres d'examiner les résolutions prises en commun par leurs délégués au CAEM et de notifier dans un délai déterminé, dans les 60 jours, s'ils acceptent la recommandation ou non, j'estime quand-même que la recommandation ne diffère pas tellement d'un traité international de ce point de vue qu'en résultat des engagements réciproques, apparaissent dans la vie intérieure des Etats des prescriptions juridiques dont le contenu n'a pas été déterminé primairement par les organes législatifs à l'intérieur de l'Etat, mais qui sont nées dans un milieu international, issues de l'activité codificatrice commune des pays-membres du CAEM intéressés.

L'effet de la recommandation est aussi assez près de celui d'un traité international multilateral : par la notification de l'adoption de la recommandation

l'engagement s'intègre dans le système juridique intérieur de l'Etat ayant adopté la recommandation et ceci, à mon avis indépendamment du fait que la convention ou la recommandation fut promulguée ou non par un acte de législation intérieure. Ce qui fait que la question du rapport entre «la règle juridique» adoptée au CAEM et la norme nationale ne se pose même pas, puisque les prescriptions élaborées et adoptées au CAEM apparaissent dans les pays-membres comme droit national intérieur, en même temps les organes du CAEM ne créent même pas de droit en résultat final de l'activité de prise de décision dans le CAEM, la prise de décision n'arrive pas à la codification, seulement jusqu'au seuil de celle-ci.

Ces constatations là restent également valable si l'on considère le groupe de cas qui n'est pas rare non plus dans le cadre de la réglementation des rapports juridiques contractuels des organes de gestion dans le CAEM notamment que la disposition élaborée par l'organe compétent du CAEM, adoptée et ainsi apparaissant également dans le système juridique intérieur des Etats-membres, présente des lacunes dans le sens qu'elle ne règle pas un groupe donné des questions à réglementer, mais elle fournit une norme de type de droit international privé qui met au point lequel des droits nationaux respectifs pourrait être appliqué à la question non règlementée. Bien que cela puisse être sujet de discussion, mais à mon avis il peut aussi arriver que c'est faute d'une telle norme de collision fixée en communiqué, le droit national d'un des Etats-membres soit appliqué, même si ce cas n'est pas un exemple brillant du processus d'intégration, étant donné que le problème aura été résolu à l'aide de la méthode générale qui s'était établie traditionnellement pour toutes sortes d'affaires de caractère international et qui est encore le produit de la phase d'évolution précédant la période des intégrations économiques. En tous cas, on peut dire aussi de cette variation qu'elle ne soulève pas la question des rapports entre la norme créée au niveau du CAEM et le droit national.

L'analyse du processus de la création du droit au niveau du CAEM sous forme de recommandations nous a amenés donc à la conclusion qu'au fond le droit ne nait pas à deux niveaux, mais seulement à un seul: à celui des Etats-membres. Selon les apparences le produit final de l'activité de décision dans le CAEM apparait, sous forme de droit, en réalité aussi bien dans le CAEM que dans les Etats-membres. Or, cela ne découle pas du fait qu'effectivement la réglementation juridique, élaborée par les Etats-membres intéressés d'un organe du CAEM dans une question donnée, se fait aussi bien dans le CAEM que le Etats-membres, mais du fait que le processus de naissance du droit dans le CAEM a plusieurs phases au point de vue méthodique. La première partie du processus de codification se déroule dans les organes compétents du CAEM, ceci arrive à des phases très importantes, vu que l'organe compétent du CAEM adopte, sous forme de recommandation, la proposition pouvant être considérée comme projet de règle juridique. Il n'y a point de doute cependant que ce ne soit pas encore une règle juridique, elle la devient lorsque les Etats-membres, conformément à leur ordre constitutionnel intérieur, l'adoptent et notifient l'adaptation de la recommandation.

J'ajoute que ce que je viens de dire du caractère juridique des recommandations, est aussi valable pour le cas où les Etats faisant partie du CAEM créent des droits et obligations par des traités internationaux conclus entre eux, car dans ces cas non, plus ce n'est pas le CAEM qui codifie, en tant qu'organisation internationale, mais les Etats, ou gouvernements qui y participent.

Cependant par tout ce que je viens de dire à propos de l'activité de codification au sein du CAEM, j'étais loin de vouloir affirmer que le CAEM, an tant qu'organisation internationale, n'eut pas la capacité de création du droit. Je reviendrai encore au réglement et règles de procédure des divers organes du CAEM qu'il faut considérer comme des normes de caractère juridique. J'attirerais maintenant plutôt l'attention sur la capacité du CAEM à conclure des traités internationaux, puisque des traités internationaux comme par exemple celui du CAEM avec le gouvernement de l'Union Soviétique sur la réglementation des questions relatives à l'emplacement du bureau de CAEM sur le territoire de l'Union Soviétique, le traité entre le CAEM et le Gouvernement yougoslave sur la participation de la Yougoslavie aux travaux du CAEM, l'accord de coopération entre le CAEM et la République Finlandaise, ont été conclus non pas par les pays membres du CAEM, mais le CAEM lui-même avec des Etats tiers (ou bien dans un des cas cités, avec le gouvernement de l'Union Soviétique).

Dans les domaines donc où les normes à élaborer réglementent l'activité des organismes d'Etat ou de gestion ou les droits et les obligations des Etats mêmes, n'apparaissent des règles juridiques dans le sens dogmatique c'est-à-dire, des normes qu'on peut appeler droit qu'à un seul niveau notemment à celui de la législation intérieure des Etats intéressés, participant au CAEM. Les lieux où se préparent ces règles ne sont pas ces Etats, mais l'organe du CAEM qui dispose de compétence dans la question donnée — c'est la spécialité de cette sorte de création du droit — la préparation est faite par les délégués mêmes des Etats et les phases essentielles de conciliation des intérêts et de prise de décisions du processus de codification se déroulent dans le CAEM, mais le matériel ne devient droit qu'en passant par les organes législatifs des Etats intéressés.

Il n'y a donc pas lieu de supposer que dans le cas des Etats groupés dans le CAEM, organisation de l'intégration socialiste économique, apparaissent les mêmes dispositions juridiques, c'est-à-dire celles qui réglementent les mêmes questions, au niveau de la communauté et à celui des Etats. Le CAEM est donc une organisation d'intégration économique où la question des rapports entre les normes juridiques en vigueur dans les Etats-membres et celles créées dans l'organisation d'intégration, ne demande pas à être réglementée.

Il y a un autre groupe de règles, en partant duquel nous pouvons faire la contre-épreuve de ces constatation-là; je pense aux documents normatifs qui fixent les réglements, respectivement les règles de procédure des organes du CAEM. Ceux-ci ont également le caractère de règles juridiques, puisqu'ils sont obligatoires pour les Etats qui ont participé à leur élaboration et adoption. Ces règles normatives connues d'ailleurs dans toutes les organisations internationales, se présentent de même à un seul

niveau et non pas deux, avec la différence que dans ce domaine nous ne sommes pas victimes d'un mirage optique comme tout à l'heure (à propos des documents fixant les droits et obligations des Etats, des organismes administratifs et gestionnaires) étant donné qu'il est évident, dès le premier abord, que la réglementation juridique n'apparait qu'au niveau de la communauté et non pas à celui des Etats.

4. Sur la base des conclusions tirées de cette analyse-là on peut énoncer que l'existence du CAEM ne débouble point les prescriptions juridiques, évite le mode de règlementation qui crée une règle juridique relative à la même question au niveau de la communauté et une autre à celui de l'Etat, de ce fait il est inutile d'élaborer des règles hiérarchiques, prioritaires entre les deux sortes de réglementation.

Mais alors, quelle est la réponse donnée par le CAEM à la demande de réglementation juridique de l'intégration économique? Cette question est motivée par le fait que comme il ressort des ce qui précède — les éléments de l'appareil juridique de l'intégration économique qui se fait dans le CAEM, apparaissent au niveau du système juridique des Etats-membres, faisant donc partie des systèmes juridiques lesquels par ailleurs, pour diverses raisons, diffèrent l'un de l'autre dans une mesure considérable.

5. Pour voir le problème dans son ensemble, nous devons jeter un coup d'oeil sur l'objectif du CAEM à savoir de rapprocher graduellement, c'est-à-dire d'unifier les règles juridiques intérieures (nationales) des pays-membres qui concernent des domaines apparentés aux processus d'intégration économique. (Voici ce qu'on peut lire au premier alinéa du 15e chapitre du Programme Complexe: . . . Le perfectionnement des fondements juridiques de la coopération se fera notemment . . . par la voie du rapprochement des normes juridiques nationales respectives, ainsi que par l'unification de celles-ci de la part des pays intéressés.)

C'est un objectif de grande portée. De ma part, je le considère comme une tentative unique, car en comparaison avec les essais d'intégration apparaissant dans les diverses régions du monde depuis le début de notre siécle, elle a recours à une méthode sans exemple jusqu'ici. Simplement dit : une tout autre sorte de mécanisme juridique était au service des objectifs d'intégration économique, juridique, ou politique qui s'étaient présentés avec des aspirations soit universelles, soit régionales au cours des quelques décennies écoulées : ou bien l'élaboration et l'adoption d'un droit unifié, ou bien la subordination des droits particuliers au droit intégré, ou encore l'unification des normes de collision des systèmes juridiques.

L'harmonisation — le rapprochement, l'unification — des droits intérieurs est un nouvel important, surtout la variété de cette méthode qui s'est établie dans le CAEM. J'essaie d'exposer brièvement cette méthode. Cela ne parait pas difficile, car la marche de l'harmonisation n'est pas encore élaborée dans son ensemble, les documents y relatifs du CAEM, en premier lieu le chapitre du Programme Complexe consacré à la question des droits formule seulement en grandes lignes la marche de l'unification des droits par la voie de l'harmonisation.

L'essence de la chose est consiste à mon avis à ce que le Programme Complexe lui-même a désigné certains domaines sous une forme concrète — qui se trouvent

d'ailleurs les plus proches du noyau central des processus d'intégration économique — où les Etats-membres doivent étudier, en premier lieu par l'intermédiaire de méthodes comparatives, la possibilité de rapprochement, de l'unification de leurs règles juridiques nationales y relatives. Conformément aux méthodes de travail établies et adoptées dans le CAEM, ce dernier cède la définition des sujets concrets, de la marche et des méthodes de l'étude à ses organes compétents, de toute évidence avec l'idée qu'il faut prévoir toute la marche, le commencement et l'achèvement de ce travail, la programmation, les responsables, etc. de ses diverses phases, dans les plans de travail annuels des organes compétents du CAEM.

Etant donné qu'il y a encore peu d'expériences pratiques dans ce domaine, puisque depuis l'adoption du Programme Complexe aucun processus commencé à ce sujet n'est encore arrivé à son point final, je tiens à remarquer seulement ici que le rapprochement et l'unification du droit national des Etats-membres est souhaitable en premier lieu dans les domaines qui constituent le droit subsidiaire des questions élaborées et adoptées dans le CAEM, non réglées par des normes unies, c'est-à-dire où le droit uni lui-même prescrit l'application des règles juridiques des Etats-membres dans certaines questions, ou là où, à défaut de telles prescriptions expresses, les droits nationaux peuvent être appliqués. Il va de soi, je pense, que le rapprochement des droits subsidiaires est mis au premier plan, puisque c'est une expérience quotidienne que par exemple sur la base des dispositions unifiées des Conditions Générales de Libraison on peut arriver à des résultats diamétralement opposés si là où l'on applique le droit subsidiaire, dans un des cas on applique le droit de l'un, dans l'autre cas le droit de l'autre Etat-membre) car, mettons, c'est l'application du droit du vendeur qui est stipulé). L'autre domaine où l'harmonisation des droits nationaux est au premier plan de l'intérêt est la sphère des relations contractuelles où jusqu'ici on n'a pas pu élaborer des normes unifiées. Il faut dire cependant que beaucoup hésitent encore s'il est utile de rapprocher les droits nationaux dans le CAEM à propos de questions de telle importance, au lieu d'élaborer de normes unifiées.

C'est d'autant vrai, car le Programme Complexe et à la suite de ceci les organes compétents du CAEM ne se sont occupés que d'une partie du processus d'harmonisation, à savoir de déclarer qu'au cours de l'établissement du mécanisme juridique du CAEM, c'est le rapprochement et l'unification des normes juridiques nationales qui est une des méthodes possibles, que ces travaux doivent être commencés et introduits par des études de droit comparé élaborées concernent certains problèmes, études qui permettent de mettre au point la question de savoir dans quelles questions et dans quel sens les droits nationaux diffèrent l'un de l'autre.

Or, on a peu dit jusqu'ici d'une question extrêmement importante notamment comment se formerait la seconde phase, finale, de ce processus d'unification de droits. Pourtant ce qui est le plus important c'est de savoir comment des Etats souverains faisant parties d'une organisation d'intégration économique peuvent résoudre le problème qui consiste à ceci : en résultat d'une enquête comparative les droits nationaux doivent progresser dans le sens du rapprochement dans les domaines où les

législations nationales, pour des raisons économiques, politiques, sociales, donc dans l'ensemble historiques, ont évolué de manières différentes avant que ces pays se soient engagés dans le chemin de l'édification du socialisme et s'évoent dans un certain sens même actuellement, et probablement s'évolueraient encore pendant longtemps en partie de manières diverses.

Les méthodes de ce rapprochement ne sont pas élaborées, pourtant il y a toute une série de questions qui surgissent sur lesquelles il faut réfléchir à deux niveaux: à celui du CAEM et à celui des Etats-membres.

La situation parait plus simple au niveau du CAEM dans la mesure où, en résultat d'une étude comparative, il n'y a que deux alternatives qui puissent s'offrir: ou bien il sera recommandé aux Etats de tenir compte d'une manière adéquate des constatation faites au cours de l'enquête comparative en cas d'une codification ultérieure future dans le pays du domaine du droit donné — mais même dans ce cas, il faut prendre position grosso modo au sujet du modèle d'après lequel les droits nationaux, parfois très différents à propos de certaines questions, doivent s'intégrer — ou bien il faut tirer la conclusion que les différences entre les droits nationaux ne peuvent être conciliées qu'en mettant à l'ordre du jour la réglementation de la question donnée d'une manière unifiée. Dans ce dernier cas, interviennent les mécanismes de procédure prévoir la tache dans le plan de travail de l'organe compétant du CAEM, constituer des groupes de travail d'experts en vue de résoudre la tâche, etc — qui sont nécessaires sous n'importe quel aspect de l'intégration économique pour résoudre des questions données.

Je souligne les points d'interrogation à propos de l'harmonisation, du rapprochement des droits à l'autre niveau : celui des Etats-membres.

Il-faut partir du fait qu'en résultat des travaux accomplis au sein du CAEM en vue de rapprocher, unifier les droits nationaux, certaines constatations générales sont faites pour savoir quelle serait la solution optimale des règles juridiques nationales des Etats-membres à propos une question donnée.

Comment pourraient les Etats-membres réagir à ces constatations? Existe-il des mécanismes à l'intérieur des Etats-membres, à travers lesquels ces constatations faites en commun pourraient se faire valoir? On peut tout de suite poser la question, du côté du CAEM, comme du côté des Etats-membres s'il y a quelqu'obligation juridique pour mettre en œuvre ces constatations collectives?

J'estime que les Etats n'ont aucune obligation de caractère juridique de mettre en œuvre dans leur législation les constatations des organes compétents du CAEM faites dans l'intérêt du rapprochement et de l'unification des règles juridiques nationales; en outre, à l'intérieur des divers pays il n'y en a probablement pas de mécanisme adéquat actuellement. Cependant, ce n'est pas là où je vois le problème.

Quant à l'utilisation des constatations tendant à la réglementation chez soi d'une manière identique ou semblable des sujets étudiés en commun dans le CAEM, le problème est le suivant : prenons à titre d'exemple le droit civil, plus précisément le droit des obligations qui est le plus pratique.

Le droit d'obligation est en partie une norme unifiée dans le CAEM, mais il recèle des lacunes, des « brèches » qu'il faut combler par le droit national. On considère comme droit national p.e. le droit subsidiaire des Conditions Générales des Livraison du CAEM, mais les dispositions concernant ce domaine dans les droits nationaux les unes des autres. Peut-on espérer de pouvoir modifier ces dispositions concrètes — par exemple la norme réglant l'exemption des conséquences de la non-exécution intervenue à cause d'un force majeur ou de n'importe quelle autre norme — isolées, en les détachant de toute la législation civile nationale? C'est peu probable. En effet, la juridiction civile nationale des pays-membres du CAEM joue au moins un double rôle à ce point de vue. L'un est l'organisation des relations juridiques nationales, l'autre la promotion du processus d'intégration dans le CAEM par les moyens particuliers du droit, en cas de références ou du manque du droit des obligations unifié du CAEM.

Les codes civils nationaux sont créés de toute évidence pour remplir la première fonction, la seconde est seulement d'un caractère secondaire. Il est évident qu'en créant ces codes dans les divers pays — codes qui sont précisément des systèmes parce que leurs éléments sont établis en égard les uns aux autres — c'est la fonction principale de la juridiction civile: l'organisation de l'économie nationale qui est devant les yeux. Or, l'exigence de l'économie nationale des divers pays socialistes vis-à-vis de la juridiction civile au moins en partie est variée et elle le restera aussi dans l'avenir. (Les différences existantes dans les droits civils ne sont pas des faits du hasard, en outre il faut, naturellement, attacher une importance particulière, parmi les motifs des différences, aux diverses marches d'évolution de la période d'avant la libération.)

Vu ces doubles rôle et face du droit civil des divers pays-membres du CAEM, et eu égard à ce que l'application quotidienne de ces règles du droit civil se fait entre partenaires contractuels dans le pays et non pas sur le plan international, de ma part je ne vois pas beaucoup de possibilités réelles à ce que les divers pays-membres puissent rapprocher ou unifier certaines parties de leurs droits civils, en résultat des enquêtes comparatives effectuées au sein du CAEM. Je pense qu'à la lumière de ce qui vient d'être dit, il va de soi qu'un tel rapprochement ou unification n'est pas question de décision ou de bonne volonté.

En principe et d'une manière abstraite on peut supposer que dans les divers pays-membres du CAEM soient constituées des règles du droit civil particulières du pays, lesquels, à côté du droit civil traditionnel, visent spécialement les relations dans le CAEM, mais je pense qu'il est inutile de citer des arguments pour affirmer qu'au cas où l'on pourrait instituer dans tous les Etats-membres intéressés de telles règles parallèles, il serait plus pratique de créer des normes unifiées mêmes.

6. Au chapitre précédent j'ai fait un détour vers le programme de rapprochement et de l'unification des droits au sein du CAEM avec la promesse que par la suite j'essayerais de revenir sur la question de savoir comment est le mécanisme juridique du CAEM.

Je pense qu'il ressort de ce qui précède que premièrement l'établissement du mécanisme juridique du CAEM se fait graduellement. C'est que le CAEM, à la

différence d'autres organisations d'intégration internationales ne constitue pas tout son mécanisme juridique, ou tout au moins les éléments essentiels de celui-ci, au moment de sa fondation. Deuxièmement : le développement graduelle de l'appareil juridique se fait en partant de deux sens : du côté de la communauté, comme côté des Etats-membres. Sur le plan de la communauté cela se fait d'une manière planifiée, comme les organes dirigeants du CAEM le décident, on élabore au fur et à mesure les prescriptions juridiques dont l'ensemble constituera le système de conditions juridiques de la coopération au sein de CAEM.

Je répéte que je crains qu'un des composants de l'établissement d'un système juridique, le rapprochement et l'unification des systèmes juridiques nationaux des Etats-membres par la voie d'études comparatives ou d'autres méthodes ne puisse donner les résultats qu'on en attend. Comme ceci a des raisons objectives et non pas subjectives, je pense qu'à l'occasion il faudrait y réfléchir et si besoin est, modifier les conceptions y relatives. Il est possible que si les énergies considérables qui sont retenues par cette methode de la codification au sein du CAEM, se libérant pouvaient être intégrées dans l'autre méthode possible, le processus de la formation du droit unifié, cela pourrait accélérer la constitution d'un système de conditions juridiques.

7. Aujourd'hui dans l'activité juridique du CAEM et je pense dans tous les domains d'activité, on a l'habitude d'examiner l'état de l'accomplissement des tâches déterminées par le Programme Complexe, si l'on cherche la réponse à la question : où en est le processus d'intégration dans le domaine donné.

Pour quelle durée le Programme Complexe, c'est-à-dire le XV^{e} chapitre de celui-ci, règlement la coopération juridique a été prévu? Je pense qu'il serait impossible de trouver une réponse directe à cette question. Cependant, dans un sens général on peut risquer l'affirmation que tant que le programme n'est pas entièrement réalisé, il restera de toute façon à l'ordre du jour. Mais peut-être n'est-il pas irréel non plus de dire que tout programme ne fait progresser les choses que jusque-là et dans la mesure où les conditions et les circonstances dans lesquelles il a été conçu et auxquelles il est conforme n'ont pas changé d'une manière à remettre en question la réalité de l'exécution du programme.

Je ne pense pas qu'il soit opportun d'examiner dans le cadres de cet article la question de savoir si, au cours des quelques années écoulées, les circonstances avaient changé et en quelle profondeur, et si ce changement ne rendrait pas motivée la modification du Programme Complexe, ou bien celle des tâches y désignées sur le plan de l'édification du système des conditions juridiques?

Ces temps-ci il n'est pas rare qu'on analyse les effets des processus défavorables amorcés dans l'économie mondiale au début ou bien vers le milieu des années 70, même à propos de questions sur lesquelles il n'est pas certain qu'ils aient exercé une influence profonde. Je crois cependant que le lecteur sera d'accord avec moi si j'exprime ma conviction que l'évolution des conditions de l'économie mondiale a influencée d'une manière défavorable l'activité des pays socialistes, comme celle de leur organisation économique d'intégration, le CAEM. Souligner les interactions de l'économie et du

droit passe déjà aujourd' hui pour un lieu commun, je me contente donc de poser tout simplement la question suivante : d'une part à cause de la longueur relative du temps écoulé depuis l'élaboration du Programme Complexe lui-même, d'autre part, eu égard aux changements intervenus dans l'économie mondiale, ne serait-il pas d'actualité de repenser et de ranger de nouveau en ordre d'importance les tâches qui se dressent devant nous au cours de l'édification du système de conditions juridiques de l'intégration économique socialiste?

Роль правовых систем стран-членов в правовом механизме СЭВ

Т. Бан

Среди правовых вопросов деятельности СЭВ автор в настоящей статье рассматривает роль системы правовых норм в экономической интеграции. По мнению автора при исходном пункте процесса любой экономической интеграции нужно решать: какой вид возможных правовых механизмов, юридических техник будет создан. Автор на такой позиции, что СЭВ определил двойной путь развития права: такая система, которая будет выполнять роль правового аппарата экономического и научно-технического сотрудничества, постепенно сформируется в результате такого процесса образования права, который, с одной стороны, исходит от общности стран-членов, с другой же стороны происходит на уровне национальных правовых систем стран-членов.

Автор сперва занимается процессами, происходящими на стороне общности стран-членов. Он доказывает, что в СЭВ в значительной части случаев очень важные, но только подготовительные фазы процесса образования права происходят в самой организации интеграции. Ведь когда в данных органах СЭВ зарождается рекомендация в результате совместной работы представителей стран-членов, делегированных в эти органы, тогда процесс правотворчества, принятия решений — вопреки видимости — еще не заканчивается. Ибо из основных принципов деятельности СЭВ вытекает то, что рекомендация становится полноценной в том случае, если компетентные государственные органы стран-членов в течение 60 дней извещают о результатах рассмотрения ими рекомендаций, и это во многих отношениях является подобным процессу ратификации международных договоров. Соответственно этому значительная часть совместно разработанной системы норм тоже нельзя считать таковой, которую можно было бы рассматривать как нормы СЭВ, поскольку эти правовые предписания в конечном счете тоже проявляются в национальном праве стран-членов. Специальностью правотворческой деятельности, начатой на уровне общности стран-членов и завершающейся на уровне отдельных стран-членов, является то, что в результате данной работы в национальной правовой системе каждой страны-члена — по крайней мере тех, которые из-за своей заинтересованности участвуют в принятии решения — опубликована идентичная норма по регулированию данного вопроса. Это, по сути дела, унификация и тождественно такой технике, которая все чаще употребляется универсально или в различных регионах мира и в результате которой разрабатываются единые законы для рефулирования различных вопросов.

Вслед затем автор занимается другой стороны установления права СЭВ. Это — устранение различий между национальными правовыми системами путем их постепенного сближения. Способом этого в настоящее время является сравнительное изучение данных вопросов в интересах точного определения различий. Автор на такой позиции, что вследствие того, что в период до окончания второй мировой войны страны-члены СЭВ прошли различные пути развития и их юридические традиции и образ мышления и поныне довольно различаются, далее что вопреки единого социалистического развития их правовое развитие — наряду со сходствами — и в настоящее время проявляет различия, проще сделать упор на способе унификации, потому что в настоящий период от этого можно ожидать быстрее достигаемые результаты, будто бы страны-члены в своем национальном законодательстве — по своей инициативе — трудились над формированием тождественных или подобных друг другу правовых норм.

The role of legal system of the member-states in the legal mechanism of CMEA

T. BÁN

The author surveys the role of legal system in the economic integration among the legal questions of the operation of CMEA. According to his opinion at the starting point of every kind of economic integration process it should be decided: which kind of the possible legal mechanisms and legal techniques should be created. According to the author the CMEA decided a dual way to build up its legal system: on one hand from the community itself, on the other hand on the level of the national legal systems of the member-states will yield gradually such a system, which plays the role of the legal apparatus of the economic and scientific-technological co-operation.

The author deals with the processes taking place on the community sphere first of all. He proves that in the CMEA in sizable part of the cases very important, although only preparative phases of law creation take place in the integration organization itself. As in the given organs of CMEA a recommendation is created as a result of the common work of the delegations of the member-states, then—till a certain grade despite the appearance—the decision process, the way of legislation is not concluded. It comes from the basic operative principles of CMEA that the recommendation is becoming fully appropriate if the competent organs of the member-states acknowledge it within a period of 60 days, which is in many aspects similar process as the ratification of international agreements. Followingly, a large part of the commonly created norm system cannot be considered as CMEA norms, because ultimately these normative regulations appear in the national law of the member-states. The specialty of this legislative activity, which starts at the community and ends at national level—at least in those countries, which—being interested—participate in taking the decision—the same regulation appears in the national legal systems for ruling a given question. Actually, this is unification, basically the same technique, which is used more and more frequently in different regional spheres of the world or universally, and as a result universal laws are worked out for regulating certain problems.

Afterwards the author deals with the other side of the CMEA law creation, namely with the elimination of the differences of the national legal regulations in the way of approaching to each other. The recent method of this approach is the comparative analysis of given questions for the sake of proper location of the differences. The author expresses his opinion that partly because the prewar development of CMEA member-countries was different and their legal tradition and theory is rather different even today, partly because despite the universal socialist development beside the relations and similarity their legal development shows differences, it is simpler to put the emphasis on the unification methods today in the CMEA. Therefrom we can expect faster results, than in case the member-states would take efforts to work out similar or identical legal regulations starting from their own initiatives.

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Über die grundlegenden rechtlichen Fragen der zwischenstaatlichen ökonomischen Organisationen der RGW-Staaten

M. Balásházy
Wissenschaftliche Mitarbeiterin
Karl-Marx-Universität, Budapest

Die Abhandlung befaßt sich mit der Integration des Organisationssystems der RGW mit besonderer Hinsicht auf die zwischenstaatlichen Wirtschaftsorganisationen. Sie analysiert die diesbezüglichen Mangeln des internationalen Rechtes und deren theoretischen Zusammenhänge in der Entwicklung der Organisationen.

Die funktionale Analyse dehnt sich auf das Entscheidungsverfahren sowie auch auf deren praktischen Widersprüchen aus. Der letzte Teil der Abhandlung befaßt sich mit der Mitgliederschaft der ungarischen Wirtschaftsorganisationen in den zwischenstaatlichen Organisationen.

1. Die Wirtschaftsorganisationen der Integration

Der gegenwärtige Abschnitt der RGW-Integration ist die Periode, in welcher der organisationsmäßige Ausbau der Kooperation vor sich geht. Für die frühere Periode waren die Warenlieferungen des Außenhandels charakteristisch. Die rechtliche Projektion dieses wirtschaftlichen Entwicklungsniveaus war der vorerst noch sämtliche Ansprüche befriedigende Außenhandelsvertrag. Die wirtschaftliche Entwicklung der RGW-Staaten führte dann zur nächsten Stufe der Entwicklung der Integration, genauer gefaßt: zur Integration der Produktion. In der vorangegangenen Periode war nämlich der wechselseitig vorteilhafte, harmonisierte Außenhandel charakteristisch, was doch den begrifflichen Merkmalen der Integration nicht geradezu entspricht. Die in der Wirtschaft vor sich gegangenen Änderungen verlangten also auch die Modifizierung des rechtlichen Arsenals. Neben der Bedeutung der traditionellen Beziehungen gewinnen die internationalen Wirtschaftsorganisationen, als adäquaten rechtlichen Formen der Entfaltung der Integration, eine immer größere Rolle.

Was bedeutet aber eigentlich die Integration der Produktion, welche sind jene Merkmale, die den Rahmen der traditionellen rechtlichen Lösungen übertreten?

Um diese Frage beantworten zu können, liegt es an der Hand vorerst die Ergebnisse der Volkswirtschaftslehre ins Auge zu fassen, da ja die rechtliche Regelung letzten Endes eine Frage der aktuellen Wirtschaft ist.

Pécsi zufolge ist die Integration eine Einheit der Integration der Produktion und des Umsatzes. In der Integration der Produktion fassen die beteiligten Länder zwecks Schaffung der wirksamen Struktur der Volkswirtschaft, durch Spezialisierung und Kooperation die Produktionsvorgänge in eine Einheit zusammen. Die Spezialisierung und die Kooperation stellt die gemeinsame Planung zwangsweise in den Vordergrund, und setzt diese auch voraus. Nur aufgrund der einheitlichen Planung kann die internationale Arbeitsteilung verwirklicht und das Problem der Optimalisation gelöst werden. Die Integration des Umsatzes des Marktes bedeutet die Zusammenschmelzung der Märkte, indem die Warenumsatzschranken zwischen den Volkswirtschaften aufgehoben werden. In diesem Vorgang spielen der finanzielle Überbau und die damit zusammenhängenden Kategorien eine hervorragende, aktive Rolle. Die Existenz der Waren- und Geldelemente, als Produktionsfaktoren, setzen die unmittelbaren Beziehungen zwischen den Produzenten, nämlich den Unternehmen voraus. Eine derartige Zerlegung des Integrationsvorganges ist aber deshalb nötig, damit die Unterschiedlichkeit zwischen den Entwicklungsvorgängen erkenntlich wird, mit der Betonung jedoch dessen, daß sie sich zugleich gegenseitig auch voraussetzen. Eine Produktionsintegration kann ohne Umsatzintegration nicht zustande kommen, in der Entwicklung dieser beiden kann aber eine zeitliche Abweichung bestehen.[1]

Über diese Entwicklung kann, von der Seite der Organisationen betrachtet, festgestellt werden, daß es sich zwei Hauptformen der internationalen Wirtschaftsorganisationen herausgebildet haben, und zwar die zwischenstaatliche ökonomische Organisation (im weiteren: ZÖO), und die internationale Wirtschaftsorganisation (im weiteren: IWO). Für die Mitgliedstaaten steht die Wahl zwischen diesen beiden Organisationsformen frei. Diese zwei Organisationen sollen zwei verschiedene wirtschaftspolitische Ziele verwirklichen.

Der Komplexprogramm ist bestrebt den Unterschied zwischen diesen beiden Organisationen prinzipiell abzugrenzen.

Die grundlegende Funktion der zwischenstaatlichen ökonomischen Organisationen ist die Koordination der Tätigkeit der beteiligten Länder auf bestimmten Gebieten der Wissenschaft und der Technik.

Die internationalen Wirtschaftsorganisationen sollen zwecks Verwirklichung der Zusammenarbeit und der konkreten Koordination auf dem Gebiet der wissenschaftlichen Forschungs-, beziehungsweise der technischen Planungs- und Entwicklungsarbeiten, ferner zwecks gemeinsamer Wirtschaftung gegründet werden.[2] Die zwischenstaatliche ökonomische Organisation ist die entsprechende Organisation zur gemeinsamen Planung, sie ist die rechtliche Organisationsform der Verwirklichung der Produktionsintegration, eine durch den Anspruch der Produktionsintegration ins Leben gerufene Kooperationsform. In dieser Organisation spielen grundsätzlich Produktionsprobleme auf Makroebene eine Rolle.

[1] Pécsi, K.: *A KGST termelési integráció közgazdasági kérdései* (Volkswirtschaftliche Fragen der RGW-Produktionsintegration). Budapest, 1977. pp. 31 et seq.

[2] Kapitel VIII des Komplexprogramms.

Diese Organisationen werden durch Staaten ins Leben gerufen, und die Mitglieder sind Vertreter der Staaten. Durch Gründung der ZÖO handelt es sich also um die Umformung des Wirtschaftsmechanismus der Integration „von oben her".

Die Tätigkeit der internationalen Wirtschaftsorganisation wird zur aktiven Verwendung der Waren- und Geldverhältnisse gegründet sie versieht also eine wirtschaftende Funktion; sie stellt Beziehungen zwischen Unternehmen her, sie pflegt also die im Rahmen der Integration gedeihenden Wirtschaftsbeziehungen „von unten her", auf Mikroebene. Die internationale Wirtschaftsorganisation ist der adäquate rechtliche Ausdruck der Umsatzintegration. Die Trennung der Integrationsvorgänge ist selbstredend auch hier nicht steif. Bei der Umsatzintegration entstehen die Beziehungen nicht ausschließlich auf Mikroebene, sie werden auch durch Makroelemente durchwoben, auch schon deshalb, da ja die Umsatzintegration die Existenz der Produktionsintegration voraussetzt. In der Umsatzintegration ist, neben den sonstigen Elementen, der Mikrocharakter dominierend; in der Produktionsintegration herrscht, gleichfalls neben den sonstigen Elementen, der Makrocharakter vor.

Sowohl in der rechtlichen, als auch in der volkswirtschaftlichen Literatur wird darüber lebhaft diskutiert, welche Organisationsform soll oder mußbevorzugt werden.[3] Die Diskussion kann kraß auf die Grundfrage zurückgeführt werden, ob der Wirtschaftsmechanismus der Integration entsprechend dem auf der gemeinsamen Planung basierenden zentralisierten Modell ausgebaut werden soll, oder entsprechend den auf dem Waren- und Geldkategorien gründenden Marktmodell.

Aufgrund des Komplexprogramms kann die Diskussion nicht eindeutig entschieden werden, weil das Programm sowohl die Entwicklung der gemeinsamen Planung als auch die der Waren- und Geldbeziehungen vorsieht. Das ist auch verständlich, wenn wir in Betracht ziehen, daß die Zielsetzungen des Programms binnen anderthalb Jahrzehnte verwirklicht werden sollen, und so war es zweckdienlich für die Methode der Durchführung den Mitgliedstaaten eine Alternative zu gewähren. Da das Komplexprogramm keine Richtlinien gibt, das kann es auch nicht tun, setzt sich die Diskussion fort und verschiebt sich insbesondere in jene Richtung, ob „Schwerpunkte" gebildet und primäre Methoden, die die Hauptrichtung der Entwicklung der Kooperation bestimmen, gewählt werden sollen, oder soll das Ziel mittels verschiedenen Methoden gemeinsam und stufenweise realisiert werden.

Besonders in der ökonomischen Literatur der übrigen sozialistischen Länder herrscht allgemein die Meinung, — aber auch bei uns ist es keine Seltenheit —, daß eine Hauptaufgabe herausgehoben werden soll, zu deren Verwirklichung die Kräfte zusammengefaßt werden müssen.[4] Unter den gegenwärtigen Verhältnissen sollen die Bedingungen sicher gestellt werden, daß sich die Koordination, die gemeinsame

[3] Siehe: KNYZJAK, Z.: *A nemzetközi tervezés elemei* (Die Elemente der internationalen Planung), Közgazdasági Szemle 9/1975.

[4] ШИРЯЕВ, Й. С. (SCHIRJAJEW): *Экономический механизм социалистической интеграции*, Moskau, 1973. p. 185. KISS, T.: *Nemzetközi tervezési együttműködés a KGST-ben* (Internationale Planungskooperation im RGW), Közgazdasági Szemle, 6/1975.

Planung, die Spezialisierung und die Kooperation entfalten kann. Die Forschungen sollen sich auf dieses Gebiet erstrecken, da, angesichts der Integration und des Mechanismus der einzelnen Mitgliedländer, der Ausbau der Marktbeziehungen, unter Verwendung der Marktkategorien, nur zu einem späteren Zeitpunkt aktuell werden kann. *Schirjajew* steht auf diesem Standpunkt. Er stellt fest, daß der Anspruch auf Koordinierung der gemeinsamen Tätigkeit früher entsteht, als die Notwendigkeit der gemeinsamen Unternehmung und die Koordination sei der Ausgangspunkt und die Vorbedingung der Kooperation auf Unternehmenbasis.[5]

Aus der obzitierten Feststellung gelangt dann *Schirjajew* auf eine solche bestreitbare Folgerung,[6] welche die Daseinsberechtigung der sich in der letzten Zeit entfaltenden Forschungsrichtung, die die Probleme der selbständigen Unternehmungen zu ermitteln trachtet, in Zweifel zieht. Unserer Meinung nach müssen aber beide Forschungsrichtungen, unter Beachtung der gegebenen Umstände, in entsprechender Form entwickelt werden, da ja die Wirtschaftsintegration die Einheit der Produktions- und der Umsatzintegration ist. Die Erfahrungen die bisher in Funktion getretenen Wirtschaftsorganisationen in Betracht ziehend gelangen wir zur Folgerung, daß man die Gründung der internationalen Wirtschaftsorganisationen nicht in Vordergrund stellen soll, bloß deswegen, weil sie auch unter den Aufgaben des Komplexprogramms figuriert.

Anfang der 70-er Jahre war die forcierte Gründung der IWO zu beobachten. Die zu dieser Zeit gegründeten internationalen Wirtschaftsorganisationen konnten bis zum heutigen Tage eine ihrer Aufgaben nicht verwirklichen, nämlich die wirtschaftende Funktion, folglich auch nicht die wirtschaftliche Rechnungsführung. Das kann unter anderen darauf zurückgeführt werden, daß die Gründung dieser Organisationen nicht aufgrund entsprechender volkswirtschaftlicher Analysierungen — als subjektive Bedingung der Gründung — vor sich gegangen ist, beziehungsweise nicht an jenen Gebieten erfolgte, wo es wirtschaftlich begründet war.[7] Die Ermangelung der volkswirtschaftlichen Bedingungen bedeutet in der Integration besonders bei den multilateralen Organisationen ein Problem, da das unter anderen auch eine multilaterale Verrechnung voraussetzt, und — wie Kálmán Pécsi darauf hinweist — ist eigentlich auch bei dem transferablen Rubel die bilaterale Verrechnung die effektive Verrechnungsform. Das kollektive transferable Rubel ist bloß formell multilateral, dem Inhalt nach ist es bilateral.[8] Ähnliche Erscheinungen finden wir letzten Endes bei sämtlichen multilateralen Beziehungen.

Auf eine Sache muß jedoch aufmerksam gemacht werden. Eine wie immer geartete Stellungnahme bezüglich dessen, ob diese Organisationen erfolgreich arbeiten, oder nicht, kann unseres Erachtens nicht reell sein. Die Tätigkeit der

[5] SCHIRJAJEW: op. cit. p. 185.

[6] SCHIRJAJEW: op. cit. pp. 184 et seq.

[7] FARKAS, GY: *A szocialista nemzetközi gazdálkodó szervezetek perspektívái* (Perspektiven der sozialistischen internationalen Wirtschaftsorganisationen), Külgazdaság, 10/1979.

[8] PÉCSI: op. cit. p. 250.

internationalen Wirtschaftsorganisationen umfaßt die wirtschaftende, das heißt also die Mikrosphäre. Anhand dieser Tätigkeit müssen die selbständige Unternehmeninteressiertheit und die wirtschaftlichen Entscheidungen der Unternehmen zur Geltung kommen.[9] Demgegenüber steht, mangels einheitlicher rechtlicher Regelung, die Gründung von internationalen Wirtschaftsorganisationen unmittelbar mittels zivilrechtlicher Verträge den Mitgliedunternehmen nicht zu.

Es ist also von zweifelhaftem Wert über die Tätigkeit der gegenwärtig funktionierenden IWO allgemein geltende Feststellungen zu machen zu einer Zeit, wo die in diesen Organisationen potentiell anwesenden Vor- oder Nachteile noch gar nicht ermessen werden können. Die Umstände sind noch derart unausgereift, daß von grundlegenden Problemen gar nicht gesprochen werden kann.

Es ist nämlich offensichtlich, das gegenwärtig, wo die Frage der Gründung auf der Ebene der nationalen Wirtschaftslenkungsorgane entschieden wird und die Finanzierung aus Haushaltsbeiträgen vor sich geht, die ökonomische Entscheidungsselbständigkeit der Organisationen beschränkt ist. Diese Beschränktheit deformiert aber die ganze Organisation.

Das ungarische Wirtschaftslenkungssystem machte zwischen dem Funktionsbereich der Wirtschaft und der Wirtschaftslenkung einen krassen Unterschied, in diesen Organisationen konnte das aber nicht mit derselben Konsequenz durchgeführt werden. Die Einschaltung der Wirtschaftslenkungsorgane in die wirtschaftenden IWO ist nicht vorteilhaft, weil sich die ökonomischen und die Lenkungselemente vermengen. Eine derartige Verflechtung der Makro- und Mikroebene bringt mehr Probleme als Vorteile.

Eines ist jedenfalls sicher. Auch dann ist eine massenhafte Verbreitung der IWO nicht zu erwarten, wenn die Hindernisse der Gründung beseitigt werden, weil die mögliche zeitliche Verschiebung zwischen der Produktions- bzw. Umsatzintegration gegenwärtig nicht bloß eine Möglichkeit, sondern eine Tatsache ist.

Nichtsdestoweniger erfüllen die IWO in der Wirtschaft der Integration eine wichtige Rolle. Ihre Bedeutung besteht nämlich nicht in ihrer Anzahl. sondern darin, daß es für die wirtschaftenden Organisationen möglich wird, den Unternehmeninteressen entsprechend, eine diese Interessen zum Ausdruck bringende Wirtschaftstätigkeit auszuüben.

Der bisherige Entwicklungsverlauf der Integration war für die ZÖO günstig, da doch im Wirtschaftsmechanismus der sozialistischen Wirtschaftsintegration die Elemente des zentralisierten Wirtschaftsmodells eher anwesend sind, als die des Marktmodells.

Es wäre aber verfehlt zu glauben, das bei den ZÖO sämtliche Probleme beseitigt sind. Trotz der auf diesem Gebiet bestehenden objektiven Gegebenheiten gibt es nicht

[9] RÁCZ, M.: *A KGST-országok közös gazdasági szervezeteinek feladatköre, tevékenysége* (Aufgabenbereich und Tätigkeit der gemeinsamen Wirtschaftsorganisationen der RGW-Länder). Gazdaság és Jogtudomány 1–2/1977.

geringe Schwierigkeiten, wenn auch diese Probleme völlig anderer Natur sind und leichter gelöst werden können.

Auch die praktische Tätigkeit der ZÖO läßt manches zu wünschen übrig, obwohl das auch nicht den Organisationen auf die Schulter geschoben werden kann. Die Theorie ist völlig unausgearbeitet, herrschte doch immer die Ansicht, — zumindest auf dem Gebiet des Rechts —, daß die Zwischenstaatliche Organisation ein öffentlichrechtliches Rechtssubjekt ist, demzufolge die gründenden Staaten angesichts ihrer Souverenität die Fragen der Tätigkeit derselben nach ihrem Belieben regeln. Bei einer grundlegend politischen Organisation ist dieser Standpunkt akzeptabel, die ZÖO ist aber in erster Linie eine Organisation wirtschaftlichen Charakters, deshalb ist es nicht zweckmäßig die Souverenität in einer übertriebenen Weise auszulegen. Der Rückstand der Forschungen führte aber dahin, daß mangels genügender Kenntnis der Institution für die wirtschaftspolitischen Entscheidungen keine entsprechende Alternative existiert.

Bei den ZÖO handelt es sich um eine noch nicht genügend herauskristallisierte Institution. Auch über diese Organisation existieren nur rahmenhafte Vorstellungen, die Ordnung ihrer Funktionierung hat sich noch nicht herausgeformt. Es kann unübertrieben behauptet werden, daß heutzutage durch die praktische Tätigkeit der Organisationen „herausexperimentiert" wird, was schon längst hätte bekannt sein sollen. Das ist aber keine gewünschte Methode der Entwicklung der Organisationen, da dadurch dem Einfluß solcher Faktoren freier Weg geboten wird, die Resultate der Eventualitäten der momentanen Wirtschaftslage sind, die aber, da hier die Formung einer Organisation vor sich geht, sich in die Tätigkeit der Organisation fest verankern.

Die nicht genügend geklärten und umrissenen Wirkungskreise, das selbständige Interesse der Organisation, die Abwesenheit einer volkswirtschaftlichen Anschauungsweise können die Entwicklung der ZÖO in eine Richtung verschieben, daß sie jene Charaktermerkmale verliert, deren Wahrung unter allen Umständen geboten wäre.

2. Die Regelungsprobleme der ZÖO

Die äußeren Beziehungen der ZÖO sind nicht geregelt, worüber wir die Annäherungsweise von der Integrationsseite verstehen. Zu diesen äußeren Beziehungen gehören die Gründung der zwischenstaatlichen Organisation, ihr Aufbau und ihre Funktionierung.

Ebenso sind auch die inneren Beziehungen der ZÖO ungeregelt, wobei wir hier von der Seite der nationalen Wirtschaft vor Auge haben; zumeist sind hier die Beziehung der in der Organisation als Mitglied beteiligten nationalen Organe und der ZÖO als Ganzes, zu den nationalen Wirtschaftslenkungsorganen und ökonomischen Organisationen.

Es fällt äußerst schwer die Tätigkeit der zwischenstaatlichen ökonomischen Organisationen in den Rahmen der nationalen Wirtschaft einzufügen, wenn eine

einheitliche internationale Regelung fehlt. In dieser Beziehung wurden zunächst nicht einmal Versuche unternommen, wie es bei den IWO der Fall war. Wir möchten betonen, daß es durchaus nicht unser Absicht ist, die ZÖO irgend welchen strengen Rechtsnormen unterordnen. Davon ist gar keine Rede, und zwar aus zwei Gründen. Einerseits halten wir es nicht für vernünftig eine noch im Entstehen begriffene Institution unter strenge rechtliche Regelung zu ziehen, weil ja dadurch die Möglichkeit der dynamischen Entwicklung gehindert würde. Andererseits aber auch deshalb nicht, weil die ZÖO eine zwischenstaatliche Organisation und als solches Subjekt des Völkerrechts ist. Wir wollen die gründenden Staaten überhaupt nicht einschränken. Es muß natürlich die Möglichkeit geboten werden, daß die Regierungen der betreffenden Staaten eine solche Organisation gründen, welche sie wollen, das heißt, daß sie von der einheitlichen Regelung Abstand nehmen, falls es angesichts der Tätigkeit der Organisation, oder aus sonstigen Gründen, laut Beurteilung der Gründer für begründet erscheint.

Die praktischen Erfahrungen scheinen zu beweisen, daß in der Mehrheit der Fälle die Einführung einheitlicher Funktionierungs- und Organisationsprinzipien denkbar ist, obwohl momentan bei den Organisationen gewisse gemeinsame Züge gegeben sind, der Aufbau und die Funktionierungsordnung jeder einzelnen muß aber separat „studiert" werden, und zwar wegen des Risikos einer etwaigen Abweichung.

Die Ungeregeltheit der äußeren Beziehungen der ZÖO wirkt sich natürlich auch auf die inneren Beziehungen aus. Die Vielfalt der Organisationen verhindert es, daß sich die ZÖO an die Arbeit der inneren Wirtschaftslenkungsorgane harmonisch schmiegen können.

Es müßten einheitliche Funktionierungsprinzipien und Regeln ausgearbeitet werden. Die Wissenschaft des Völkerrechts befaßt sich bereits mit dem Problem der internationalen Rechtssubjektivität der internationalen Organisationen, obzwar es bisher noch nicht gelungen ist die Bedingungen der Rechtssubjektivität festzulegen.[10] Wir können uns bloß auf die Feststellungen des positiven Rechts stützen, wenn wir die Rechtssubjektivität einer gegebenen Organisation und deren Inhalt feststellen wollen. Deshalb ist es äußerst wichtig diese Fragen positivrechtlich zu regeln. Es kam in 1966 in Warschau über die ZÖO ein Abkommen zustande. (Abkommen über den Rechtsstatus und die Vorrechte der internationalen Zweigorganisation für wirtschaftliche Zusammenarbeit.) Dieses Abkommen gewährt den zwischenstaatlichen ökonomischen Organisationen die traditionellen Vorrechte und Immunität, ähnlich der Immunität und der Vorrechte der diplomatischen Körperschaften. Demzufolge sind die Vermögensgegenstände der Organisationen von der Konfiskation, bzw. Beschlagnahme durch die Verwaltungsbehörden befreit; die Akten und Dokumente der Organisation, sowie die zu deren Aufbewahrung dienenden Räumlichkeiten sind

[10] HARASZTI-HERCEG-NAGY: *Nemzetközi jog* (Internationales Recht). Budapest, 1979, p. 15.

unverletzbar. Auch den Vertretern der Organisation stehen spezielle, durch das Völkerrecht gesicherte Befugnisse zu. Ihre amtliche Korrespondenz ist unantastbar; die Organisationen sind von der Entrichtung der direkten Steuern befreit, sie sind befreit von der Anmeldungs und Evidenzhaltungspflicht, usw.

All diese Berechtigungen bringen die Organisationen und deren Vertreter mit den diplomatischen Körperschaften bzw. mit den Diplomaten in ähnliche Lage.

Diese Art der Regelung des Rechtstatus muß aber als eine Zwangslösung angesehen werden, die nicht ohne Widersprüche ist. Die Immunität der diplomatischen Körperschaften dient gerade dem Ziel, ihnen gegenüber den sonstigen Organisationen des Empfangsstaates eine Sonderstellung zu sichern. Dadurch sollen die Sonderstellung, die Angehörigkeit zu einem anderen Land, die Wahrung der Sonderinteressen des anderen Landes ausgedrückt und betont werden. Demgegenüber muß aber die ZÖO eine völlig andere Funktion erfüllen. Es ist zweifelsohne begründet, daß ihnen ein internationaler Status eingeräumt wird, dieser internationale Status hat aber einen völlig anderen Inhalt, als der bisherige traditionelle internationale Rechtsstatus.

Die ZÖO sind gemäß des völkerrechtlichen Kategorisieren partikuläre Organisationen mit speziellem Wirkungskreis, die zur Verrichtung ihrer Aufgaben vielmehr bedürfen als bloß der Gewährung der „Unverletzbarkeit". Die Organisationen sollten nicht bloß von der negativen Seite her angegangen werden. Es sollte ihnen die Befugnis in positiver Form eingeräumt werden, daß sie im Rahmen der Verrichtung ihrer Aufgaben Informationen einholen und jenen staatlichen Organen überleiten können, die organisationsmäßig zwar außerhalb der ZÖO stehen, deren Tätigkeit aber an einem gewissen Punkt die Tätigkeit der ZÖO berührt. Die in den ZÖO steckenden Vorteile können nur auf diese Weise für die Nationalökonomie nutzbar gemacht werden. Hier würde sich also um den Ausbau eines Beziehungssystems neuen Typs handeln, das — wie wir sahen — nicht in den Rahmen der traditionellen völkerrechtlichen Regelung eingezwängt werden kann. Wenn wir das versuchten, würden aus rechtlichem Gesichtspunkt „unerfaßte" Gebiete bleiben. In all diesen fällen würden die Beteiligten gezwungen diese Lücken selbst auszufüllen, was aber zur Folge hätte, daß je nach Organisationen und Ländern abweichende Lösungen entstehen und die gesetzlichen Rahmen oft außer Acht gelassen würden.

Die einheitliche rechtliche Regelung müßte die Gründer, den Zweck der Gründung, ihre Aufgaben, den Aufbau der Organisation, den Wirkungskreis der einzelnen Organisationen, beziehungsweise ihre Beziehungen untereinander, die Finanzierung, beziehungsweise — entsprechend den obenerwähnten — die Beziehungen der Organisation als über einen internationalen Status verfügenden Organ, die sie mit den staatlichen Organen der Mitgliedländer begründet, erfassen.

3. Die Tätigkeit der ZÖO

Untersuchen wir aufgrund der Praxis das Ziel und die Tätigkeit der zwischenstaatlichen Organisationen etwas näher, da dies auf Regelungsfragen jeder Art eine unmittelbare Auswirkung hat. Im Rahmen dieser Untersuchung kann auch ausführlich nachgewiesen werden, daß die ZÖO eine Organisation der Integration ist.

Die ZÖO werden zur Ausübung einer Koordinationstätigkeit durch die Staaten gegründet, und als völkerrechtliches Rechtssubjekt, verwirklicht sie eine zwischenstaatliche Koordination. Zufolge der bereits zitierten Feststellung des Komplexprogramms ist sie zur Abstimmung der Tätigkeit von Volkswirtschaftszweigen und Unterzweigen befugt, und zwar in einer Weise, daß die Koordination die Ansprüche anderer Zweige der Volkswirtschaft und die Anforderungen der Mitglieder aus anderen an der Integrationsorganisation teilnehmenden Ländern vor Augen hält und harmonisiert.

Die ZÖO koordiniert also auf allgemeiner Ebene, und um das tun zu können, muß sie gewissen Organisationsanforderungen entsprechen. Die Staaten müssen in diesen Organisationen durch solche Organe vertreten werden, die das gleiche Niveau der Verpflichtungen und der Verantwortung versichern. Deshalb sieht das Komplexprogramm vor, daß an den Organisationen als Mitglieder Ministerien, staatliche Kommissionen und sonstige Oberbehörden teilnehmen.

Die Organisationssysteme der Wirtschaftslenkung der verschiedenen sozialistischen Länder, die Verteilung der Entscheidungswirkungskreise sind aber voneinander abweichend. Deshalb ist es eines der grundlegenden Erfordernisse, daß an der Arbeit der ZÖO Vertreter der Mitgliedstaaten mit identischem Befugnissen teilnehmen. Diese Frage muß unbedingt von inhaltlicher Seite erfaßt werden, denn die identischen Befugnissen bedeuten nicht unbedingt das identische Niveau der Vertretung. In den RGW-Ländern gestaltete sich nach den Wirtschaftslenkungsreformen das Verhältnis der zentralisierten bzw. der dezentralisierten Entscheidungen auf verschiedene Weise. In den Fragen der Wirtschaft wird bei uns im allgemeinen die Entscheidung auf Unternehmen-Niveau getroffen. Daraus könnte die Konsequenz gezogen werden, daß die Unternehmen in die ZÖO einbezogen werden sollten und es besteht diesbezüglich auch in der Praxis eine kräftige Bestrebung, aber dieser Forderung kann aus verschiedenen später darzulegenden Umständen nicht zu gebilligt werden.

Die ungarischen Wirtschaftslenkungsorgane müssen einen anderen Weg suchen, daß sie die Interessen der Unternehmen und auch die Gleichrangigkeit gewährleisten können. Unserer Meinung nach ist es zur Überbrückung dieser Probleme die ungünstigste Lösung die Unternehmen mit der Vertretung des Staates auszustatten.

Wenn in den einzelnen Ländern das Organisationssystem der Wirtschaftslenkung differenzierter ist, und die Entscheidung, die in einem anderen Land durch eine Organisation getroffen wird, hier in die Kompetenz mehrerer Organisationen gehört, ist ein Problem rein technischen Charakters. Deshalb darf die Anzahl der die einzelnen

Länder vertretenden Delegationen nicht zahlenmäßig fixiert werden. Der abweichenden Mitgliederanzahl der Delegationen soll keine besondere Bedeutung beigemessen werden, da ja innerhalb der Organisation die Entscheidungen durch Abstimmung gefaßt werden, und jedes Land verfügt über eine Stimme.

In allgemeinster Fassung ist das wirtschaftliche Ziel der ZÖO die Harmonisierung der Produktionsvorgänge, die Schaffung einer erfolgreich funktionierenden internationalen Arbeitsteilung durch Harmonisierung der Produktionsbeziehungen, ferner, daß die Vorbedingungen geschaffen werden, daß sich diese Beziehungen entfalten können.

Deshalb bezieht sich die sich im Rahmen der ZÖO vollziehende Koordination auf mehrere Tätigkeiten. Beinahe in sämtlichen Organisationen wurden die Standardvereinheitlichungsarbeiten zur Aufgabe gestellt, da das eine wesentliche Bedingung der im Rahmen der internationalen Arbeitsteilung vor sich gehenden Produktion ist. Ein ernstes Hindernis der Vertiefung and Erweiterung der Kooperationsbeziehungen ist, daß die Mitgliedstaaten in der Produktion voneinander abweichende Standarde benützen. In der Beseitigung dieser Schwierigkeiten wurden bereits wertvolle praktische Erfolge erreicht, es wurden mehrere abgestimmte gemeinsame Standarde angenommen und eingeführt.

Eines der wichtigsten Mittel der echten Integration ist die Spezialisierung. Es ist kein Zufall, daß im Interesse der Entwicklung der internationalen Arbeitsteilung und der dem Weltniveau entsprechenden wirtschaftlichen Produktion die Lösung dieser Frage den Vorrang hat. Auch im Rahmen der ZÖO kam es bereits zur Abschließung einer Reihe von Spezialisierungsabkommen, wenn auch die ZÖO auf diesem Gebiet keine so eindeutig erfolgreiche Tätigkeit ausübt. Das echte Erfordernis diesen Verträgen gegenüber ist die Vielseitigkeit. Anstatt dessen kommen aber meist bilaterale Abkommen zustande, eben so, wie auf sonstigen Gebieten der wirtschaftlichen Zusammenarbeit. Und das ergibt sich wieder aus den Grundproblemen der RGW-Integration, nämlich aus der Eigenheit, daß die sozialistischen Länder über keine entsprechende Kapitalkraft verfügen, in sämtlichen Ländern wird eine Mangelwirtschaft getrieben und zwischen den Ländern herrscht naturale Verrechnung. Andererseits wieder, da bei sämtlichen Mitgliedländern der langfristige Plan problematisch ist,[11] nehmen sie die Produktion nur schwer auf sich, und — da sie die Sicherheit anstreben — kommen sie dem Produktionsverbot noch schwerer nach, oder sie halten sich nicht daran.

Das Problem der Spezialisierungsabkommen ist äußerst vielfältig und kompliziert, deshalb können wir uns hier nur per tangentem damit befassen, möchten aber noch auf ein wichtiges Moment hinweisen. Darauf nämlich, daß das Zustandekommen der multilateralen Spezialisierungsabkommen oft eben durch die inneren Wirtschaftsregler gehindert wird. Das kommt am häufigsten dann vor, wenn das

[11] Hoch, R.: *A hosszútávú tervezésről* (Über die langfristige Planung), Közgazdasági Szemle, 10/1979.

aufgrund der Spezialisierung für die Erzeugung erhaltene Tauschprodukt nicht in jenem Zweig (oder nicht bei dem Unternehmen) zur Verwendung gelangt, welcher (oder welches) die spezialisierte Erzeugung vorgenommen hatte. Es wäre von volkswirtschaftlichem Gesichtspunkt betrachtet die Beteiligung an der Spezialisierung vielleicht von Nutzen, (z. B. Einsparung an kapitalistischer Währung,) das zweigliche (Unternehmen-) Interesse verhindert aber deren Realisierung.

Ein sich auch zu den Spezialisierungsabkommen eng knüpfendes Thema ist die Abstimmung der Entwicklungs- und Investitionspläne, das einen überwiegenden Teil der Tätigkeit der ZÖO bildet. Auch im Zuge der Entwicklung muß dem allgemeinen Kapitalmangel Rechnung getragen werden. Es tauchte des öfteren der Gedanke der gemeinsamen Investitionen auf, daß, falls sie erfolgreich verwirklicht werden könnte, für die Mitgliedländer von großem Nutzen wäre. Oft ist aber der Mangel an Kapital stärker als der Wunsch der gemeinsamen Investition, deshalb müssen die minder kostspieligen Methoden der Investitionskooperation bevorzugt werden, und zwar derweise, daß die einzelnen Mitgliedländer, aufgrund abgestimmter Entwicklungsprogramme, eine vorausbestimmte Entwicklung durchführen — innerhalb der nationalen Investition. Diese Lösung kann aber — angesichts des Volumens der Kraftquellen — nur bei Entwicklungen kleineren Umfangs angewendet werden.[12]

Je breiter das Feld der Tätigkeit der ZÖO ist, desto mehr nützliche Informationen kumulieren sich bei den Organisationen. Sie kann das gegebene wirtschaftliche Feld der Mitgliedländer vergleichend durchblicken, ihre Entwicklung und die Möglichkeiten der Entwicklung ermessen, die angewendete Technologie beurteilen, usw. Sie ist fähig jene Vorschläge fertiggestellt zu unterbreiten, aufgrund deren die Kooperation entwickelt werden kann, und nicht zuletzt kann sie durch Vergleichung die in den einzelnen Volkswirtschaftszweigen verborgenen, jedoch wegen Mangel an Organisation oder Anwendung eines schlechten Systems unausgenützt gelassenen Möglichkeiten ermitteln.

Die nationalen Planungsorgane müßten bei der Realisierung der gemeinsamen Planung eben von diesem Wissen Gebrauch machen. Sie müßten von den ZÖO mehr Vorschläge und Begutachtungen einholen; perspektivisch wäre das auch die Hauptaufgabe der zwischenstaatlichen Organisationen.

Es soll noch von solchen neuen Erscheinungen gesprochen werden, die sich in der Tätigkeit der ZÖO soeben entfalten. Dieser neue Zug ist, daß die Koordinationstätigkeit der ZÖO einen komplexen Charakter annimmt. Einzelne Organisationen erfassen das Vertikum der Tätigkeiten. Sie ziehen die Abstimmung der Forschung, der Erzeugung und der Verwendung in den Bereich ihrer Tätigkeit. Durch diesen ausgebreiteten Wirkungskreis werden die zweiglichen Rahmen bedeutend durchbrochen, womit die optimale Ausnützung des geistigen Kapitals möglich wird. Aufgrund der koordinierten Forschungen wird es möglich hinsichtlich der spezialisier-

[12] Balásházy-Rácz-Temesi: *Az AGROMAS döntéshozatali mechanizmusa* (Entscheidungsmechanismus des AGROMAS). Handschrift, Budapest, 1977.

ten Erzeugung wesentlich besser begründete Vorschläge auszuarbeiten. So kann ein höherer Grad der Planmäßigkeit erreicht werden, da ja nicht nur die Produktion der Mitgliedländer, sondern auch die Koordination der Forschung und der Produktion zustandekommt.

Eine solche vielseitige Tätigkeit läßt auch den organisatorischen Aufbau dieser eine so vielfältige Koordination verwirklichenden Organisationen nicht unberührt. Der Zusammenhang der Änderung der Aufgaben und den Anspruch auf organisationsmäßige Änderungen wollen wir später behandeln.

4. Der organisatorische Aufbau der ZÖO

Gegenwärtig wird der organisatorische Aufbau der ZÖO durch das jeweilige Gründungsabkommen geregelt. Die durch individuelle Akten gegründeten Organisationen verfügen aber über gemeinsame Züge. Das höchste lenkende und Entscheidung treffende Organ ist der Rat. An der Arbeit des Rates nehmen die Delegationen sämtlicher Mitgliedländer teil. Die Anzahl und die Zusammensetzung der Delegationen soll — wie bereits erwähnt — nicht begrenzt werden, obwohl in der Praxis auch das vorkommt. Die Delegationen setzen sich grundsätzlich aus den Vertretern der nationalen Wirtschaftslenkungsorgane zusammen, sie sind es, die die einheitliche Stellungnahme der Mitgliedländer erarbeiten und vertreten müssen.

In die Kompetenz des Rates gehört die Lenkung der meritorischen Arbeit innerhalb der Organisation. Sie entwickelt ihre Tätigkeit aufgrund eines Planes. Der Rat bestimmt die Themen, die unter Koordination fallen, sei es Standardisierung, Spezialisierung oder was immer.

Und das ist wieder ein Gebiet, wo die Arbeit der ZÖO besser ausgenützt werden könnte. Nicht nur die ständigen Kommissionen des RGW sollten Spezialisierungsvorschläge unterbreiten, sondern auch die Organe der Mitgliedstaaten, die keiner Organisation angehören, sollten von dieser Möglichkeit Gebrauch machen.

Der Rat faßt in den in seine Kompetenz gehörenden Fragen Beschlüsse, und zwar aufgrund des Prinzips der Einstimmigkeit. Ausgegangen davon, daß der ZÖO eine koordinierende Tätigkeit ausübt, muß der Einstimmigkeit immer Geltung verschafft werden, damit die Koordination nicht in eine Lenkungstätigkeit übergreift.

Die angenommenen Beschlüsse bedeuten aber noch durchaus nicht die automatische Verwirklichung der beschlußmäßig akzeptierten Fragen. Die Durchführung der Beschlüsse geht im Wege einer Tätigkeitskette der nationalen Organe vor sich.

Wenn die Ratssitzung ein Thema behandelt, über deren Entscheidung der Rat nicht befugt ist, wird eine Empfehlung abgefaßt. Hier aber macht es sich schon stark bemerkbar, daß die Form der Aufrechterhaltung der Beziehungen der ZÖO mit anderen Organen nicht in genügendem Maß vorausbestimmt und deshalb mangelhaft ist. Ihrem Charakter nach ist diese Empfehlung nicht von rechtlicher Natur. Das muß

deshalb betont werden, weil sie, wegen der gleichen Benennung, leicht mit der RGW-Empfehlung verwechselt werden kann. Die Empfehlung der ZÖO ist nichts anderes, als eine Stellungnahme, ein Vorschlag, das aber keine Verpflichtung für die einzelnen Organisationen bedeutet. Diese Empfehlungen werden durch die einzelnen Organisationen so „popularisiert", wie die Möglichkeiten es gestatten, obwohl diese Empfehlungen ziemlich wertvolle Informationen und Ideen enthalten. Die Weiterleitung, und noch mehr die Verwendung dieser Informationen ist eine Eventualität, obwohl es sich lohnen würde die Weiterleitung systematisch und laufend durchzuführen. Es sollte den ZÖO vorgeschrieben werden Informationen zu erteilen, während auf der anderen Seite, bei den nationalen Organen das Recht der Einholung von Informationen bewußt gemacht werden sollte; dieses neuartige Verbindungssystem sollte in die Tätigkeit der ZÖO eingebaut werden.

Der Rat entscheidet in den die Tätigkeit der Organisation betreffenden grundlegenden Fragen. Sie wählt zum Beispiel den Leiter des Exekutivorgans, die Kontrollkommission und entscheidet in sonstigen Geschäftsführungsangelegenheiten.

Dem Rat ist das Exekutivorgan der ZÖO unterstellt. Es ist selten eine Körperschaft, sondern eher individuelles Organ. Zum Exekutivorgan gehört der Sachverständigenapparat der ZÖO. Die Mitglieder werden seitens der Mitgliedländer in die Organisation delegiert.

Das Exekutivorgan verfertigt Vorschläge für die Ratsitzungen, bereitet die Ratbeschlüsse vor, beziehungsweise führt die ihn betreffenden Beschlüsse des Rates durch.

In diesem Apparat häuft sich die Informationsfülle, das „Kenntnismonopol", worüber die Organisation verfügt. Bei diesem Organ ist die Möglichkeit vorhanden — teils wegen der laufenden Funktionierung, teils wegen der Fachkenntnisse —, daß es das „internationale Optimum" der Lösung der Aufgaben erreicht. Das internationale Optimum kann aber nie die Beschlüsse der nationalen Organe ersetzen, weil es ja bloß aus dem Gesichtspunkt der Aufgabe und des Ziels der ZÖO optimal ist! Zwischen den Schranken der Möglichkeiten ist es zweckmäßig das Optimum so und insofern in Betracht zu ziehen, als es mit den Interessen der nationalen Wirtschaften in Einklang steht. Seine automatische Akzeptierung würde schon eine internationale Lenkung bedeuten. Das Exekutivorgan kann nie die Entscheidungen des Rates ersetzen. Deshalb ist die genaue Bestimmung des Verhältnisses der beiden Organe zwischeneinander und die Sicherung des Primats des Rates durch eine rechtliche Garantie von äußerster Wichtigkeit. Unter konsequenter Kontrolle des Rates besteht unserer Meinung nach kein Hindernis, daß dieses Organ, im Interesse einer besseren und begründeteren Entwicklung seiner Tätigkeit, mit den nationalen Wirtschaftslenkungs- und Wirtschaftsorganen operative Beziehungen ausbaut. Die Berichterstattungspflicht dem Rat gegenüber muß aber streng vorgeschrieben und konsequent angefordert werden. Das Exekutivorgan ist zur Bedienung des Rates berufen, wie auch die ZÖO zur Bedienung der nationalen Wirtschaften verpflichtet ist.

Das dritte Organ der ZÖO ist die Kontrollkommission, deren Hauptaufgabe die Kontrolle der finanziellen Tätigkeit der Organisation ist.

Die Kontrollkommission steht auch unter der Lenkung des Rates und ist ihm verpflichtet, über ihre Arbeit Bericht zu erstatten.

5. Die Regelung und Entwicklungsrichtungen der ZÖO

Es erschienen in der letzten Zeit in der sich mit der Integration, und innerhalb deren mit den Organisationen der Integration befassenden ökonomischen Literatur und Rechtsliteratur voneinander äußerst abweichende Vorstellungen. Es muß zugegeben werden, daß auch das Thema neu ist, und — wie bereits angedeutet — sind auch die gemeinsamen Institutionen im Entstehen. Deshalb sind sie, infolge ihrer Formbarkeit, gleichzeitig auch der Stoßpunkt der verschiedenen Integrationstheorien. Denn die Frage, wie sich ihre Entwicklung gestaltet und welche Richtung sie nimmt, berührt bereits auch die allgemeine Richtungstendenz der Entwicklung der Wirtschaftsintegration. Das ist auch natürlich, da im Institutionssystem der Integration nur jene Organisationen funktionieren können, die die allgemeinen Merkmale der Integration tragen. Andererseits wirkt das Organisationssystem, als wichtiges Mechanismuselement, auf die Entwicklung der Wirtschaft selbst zurück.

Der Grund der Meinungsverschiedenheiten liegt in der Verschiedenheit der Annäherung der Integrationsvorgänge. Die eine Gruppe der Vorstellungen stellt die internationale Ebene in den Vordergrund und hebt, da es sich um Integrationsorganisation handelt, die internationale Seite hervor und setzt sich die Kräftigung dieser Seite zum Ziel. Die andere Gruppe der Vorstellungen packt die Tätigkeit der ZÖO von der Seite der nationalen Wirtschaft an, und erblickt die Arbeit auf diesem Gebiet für zweckmäßig.

Die ersterwähnte Ansicht faßt die ZÖO als Lenkungsorgan auf und will, im Interesse der Sicherung der erfolgreichen Tätigkeit, diesen Organisationen Lenkungsbefugnisse einräumen. Die Koordination der ökonomischen Tätigkeit ist eine Art der Lenkung[13] — schreibt Schirjajew, und die Logik dieses Gedanken weiterführend stellt er fest: die ZÖO führt unter den Mitgliedstaaten Koordination durch, deshalb lenkt sie auch. Den ZÖO Lenkungsbefugnisse einzuräumen würde eine oberflächliche Lösung bedeuten, obzwar übergangsweise ein anfangs sehenswerter Erfolg nicht ausgeschlossen wäre. Dauernd würde es aber die Probleme überhaupt nicht lösen. Es steht fest, daß die Integration Vorteile und Nachteile hat, die Erwägung der Vor- und Nachteile bedeutet aber eine Annäherung aus dem vorerst noch entscheidenden volkswirtschaftlichen Gesichtspunkt. Die äußere Lenkung ist aber für die nationale Wirtschaft ungünstig. Es muß einfach zugegeben werden, daß ein Zweig oder Unterzweig aus der volkswirtschaftlichen und rechtlichen Umgebung nicht herausgerissen werden kann.

[13] Schirjajew: op. cit. p. 184.

Es handelt sich also hier nicht einfach darum, daß — letzten Endes — ein wirtschaftlich ungünstiges Resultat entsteht, sondern um vieles mehr. Die Lenkung der nationalen Wirtschaften von außen ist aus politischen Gründen nicht richtig, weil das ja die Einschränkung der Souverenität der beteiligten Länder bedeuten würde.[14] Die Beteiligung an der Integration ist an sich eine politische Entscheidung, da ja die nationalen Wirtschaften zueinander zugänglich werden, das kann aber nicht gebilligt werden, daß die durch diese Entscheidung zustandegebrachten Integrationsformen die Entscheidungsberechtigten überragen. Eine solche Lösung ist durch keinerlei wirtschaftliches Interesse begründet. Die abgestimmte Wirtschaftslenkung auf ZÖO-Ebene ist das Problem der fernen Zukunft.

Die äußere Lenkungstheorie wird auch von Rüster vertreten, wenn er auch von einer anderen Seite zu diesem Resultat gelangt. Seiner Auffassung nach kann bei der Beurteilung der gemeinsamen Organisationen der RGW-Integration nicht die traditionellen Kategorien: nationales Recht Völkerrecht angewendet werden, es muß vielmehr in den neuartigen Erscheinungen auch die neue Qualität erkannt werden. Bei diesen Organisationen treffen sich die nationalen und internationalen Elemente. Diese beiden Normelemente verschiedenen Typs funktionieren nicht nebeneinander, sondern sie stehen in organischer Verbindung miteinander. In diesen Organisationen sind die Gegensätze und der Kampf der verschiedenen Elemente zugegen, und durch den Kampf dieser dialektischen Gegensätze entsteht die neue Qualität.[15]

Rüster wünscht durch diese Theorie diese Organisationen in doppelter Unterstellung funktionieren zu lassen. Das bedeutet einerseits eine internationale äußere Lenkung, andererseits aber die Lenkung der nationalen Wirtschaftsleitungsorgane. Wenn aber eine Organisation in doppelter Unterstellung arbeitet, dann müssen die Aufgaben oder Tätigkeiten bestimmt werden, in denen die eine oder eben die andere Unterstellungslinie geltend wird. Eine aus zwei Richtungen kommende Lenkung gleicher Intensität in Hinsicht einer gleichen Aufgabe ist unvorstellbar. Von der Teilung der Aufgaben, das heißt von der Teilung der Lenkung einer Tätigkeit kann keine Rede sein. Es ist nämlich klar, daß die Wirtschaft der Integration die Resultate dieser Wirtschaftsorganisation in demselben Maß benötigt, wie die nationale Wirtschaft. Demzufolge wäre die unter internationale und gleichzeitig nationalen Lenkung stehende Organisation ein Stoßpunkt. Wenn aber ein solches Zusammentreffen zu erwarten ist, dann müßte auch die Methode der Auflösung dieser Gegensätze festgelegt werden. Die Realisierung des Willens muß daher entweder auf der einen oder auf der anderen Seite erfolgen. Damit verliert aber die doppelte Unterordnung seinen Sinn, denn entweder kommt die Entscheidung von Seiten der nationalen Wirtschaft in Betracht, oder wird die äußere Lenkung geltend.

[14] SÓLYOM, L.: *KGST jogi formák és a kelet-nyugati együttműködés* (Rechtsformen des RGW und die West-Ost Kooperation). Gazdaság és Jogtudomány, 3–4/1974.

[15] RÜSTER: *Funktion und Rechtsstellung internationaler Industriezweigvereinigungen im Prozess der sozialistischen Wirtschaftsintegration* Potsdam–Babelsberg. 1973, pp. 79 et seq.

Die nationalen, bzw. die internationalen Interessen in solcher Weise zusammenstoßen lassen ist aber überflüssig. Zwar haben wir hier vom Zusammenstoß nationaler, bzw. internationaler Interessen gesprochen, wagen wir festzustellen daß es sich hier eigentlich nur um den Zusammenstoß nationaler Interessen handelt. Auch das ist nationales Interesse, daß an der gemeinsamen Organisation der Integration und an deren Tätigkeit auch die nationale Organisation beteiligt sei. Daß ist eine eigenartig politische und wirtschaftliche Erscheinung der Interessen. Der Vor- bzw. Nachteil der Beteiligung an der Integration wurde bereits erwogen. Und wenn sich die Wirtschaftslenkungsorgane neben der Anteilnahme entschieden haben, ist das deshalb geschehen, weil die Beteiligung an der Organisation für die Volkswirtschaft als vorteilhaft beurteilt wurde. Andererseits ist auch nationales Interesse, daß über den gegebenen Volkswirtschaftszweig nationale Lenkung geltend wird.

Es ist ja möglich, daß solche mannigfaltige Interessenverhältnisse inkorporierende Integrationsorganisation eine Organisation neuer Qualität zur Folge hat, nur realisiert sich eben die Entstehung dieser neuen Qualität über andere Prozesse.

Wenn unter den gegenwärtigen Bedingungen den ZÖO Lenkungsbefugnisse zugesprochen werden, dann würde es zu den obenerwähnten Interessenzusammenstößen führen. Dieser Konflikt könnte nur dann vermieden werden, wenn die zu den ZÖO gehörenden Mitgliedstaaten aufgrund ähnlicher Mechanismen funktionieren und über langfristige Volkswirtschaftspläne verfügen würden. Es ist also eine unrichtige Folgerung, daß die mit Lenkungsbefugnis ausgestatteten ZÖO geeignet wären die Wirtschaftsmechanismen einander zu nähern, und daß die gemeinsame internationale Planung die begründete Vorbereitung der langfristigen Volkswirtschaftspläne fördern würde. Die Ausarbeiter der Lenkungskonzeption[16] erachten also als Ziel, was bloß eine Vorbedingung ist.

Der langfristige Plan als Vorbedingung ist deshalb nötig, weil die Mitgliedstaaten aufgrund dessen entscheiden müssen, ob sie an der Organisation teilzunehmen wünschen, ob sie daran interessiert sind, oder nicht. In der Frage der Beteiligung kann aber nur dann Stellung genommen werden, wenn die Perspektive der Volkswirtschaft bereits geklärt ist, und damit auch die Ansprüche und Möglichkeiten der Volkswirtschaft annähernd bekannt sind. Nur auf einer sicheren Basis kann die Anteilnahme an der Integration entschieden werden, vorausgesetzt, daß die Beteiligung ertragreich betrachtet wird.

Ein solches Wirtschaftslenkungsystem ist aber sinngemäß Vorbedingung, denn nur auf diese Weise kann die Harmonie zwischen der nationalen und der internationalen Lenkung in der Methode und in den Mitteln gesichert werden. Anderenfalls ist ein Verhalten identischen Charakters zwischen den zu verschiedenen Staaten gehörenden Institutionen und Unternehmen einzelner Verfügungen gegenüber unvorstellbar.

[16] Darlegung und Kritik der Lenkungskonzeption siehe: FICZERE, L-SÁRKÖZY, T.: *A KGST országok nemzetközi gazdálkodó szervezeteinek alapvető jogi kérdései* (Grundlegende rechtliche Fragen der internationalen Wirtschaftsorganisationen der RGW-Länder). Budapest 1978, pp. 126 et seq.

6. Die praktischen Erfolge der Lenkungskonzeption

Die Diskussion zwischen den Theorien und Vorstellungen dauert mit wechselnder Intensität bis zum heutigen Tag an. Einmal verschafft sich die eine, das andere mal die andere Vorstellung stärkere Position. Diese Fluktuation wird auch durch die Vielzahl der praktischen Verfügungen bemerkbar.

Die praktische Verbreitung der Lenkungskonzeption bedeutete jene in der Mitte der 70-er Jahre entstandene Bestrebung, gemäß deren die ZÖO auf das System der wirtschaftlichen Rechnungsführen umschalten sollen. Der selbständige Rechnungsführungszwang würde jene Vorteile vernichten, die sonst aus der Tätigkeit der ZÖO hervorgehen könnten. Im Falle einer Selbstfinanzierung würde anstelle der Interessen der Mitgliedstaaten das Interesse der Selbsterhaltung der Organisation treten. Der Träger dieses Interesses ist das Exekutivorgan der Organisation, der Apparat mit internationaler Zusammensetzung.

Die Bestrebungen der Lenkungskonzeption wurden auch dadurch gefördert, daß in einzelnen sozialistischen Ländern das System eigenartiger, eine Zweirichtungsfunktion ausübende Wirtschafts- bzw. Wirtschaftslenkungsorgane entstanden ist. (Z. B. DDR, Bulgarien.)[17] Dessen Wesen besteht darin, daß die unter der Leitung dieser Organisationen stehenden Unternehmen einen bestimmten Teil ihres Gewinns an die Lenkungsorgane abführen, die davon ihre Selbsterhaltung decken. Die Interessiertheit der Lenkungsorgane an der Wirtschaft der Gelenkten setzt aber die Ausbreitung der Lenkungsbefugnisse, als alleiniges Beeinflussungsmittel voraus.

Die Möglichkeit der Umschaltung auf die wirtschaftliche Rechnungsführung begannen sämtliche Organisationen zu prüfen. Diese Untersuchungen führten in allen Fällen zu der Feststellung, daß die Verwirklichung derselben unter den gegebenen Umständen nicht möglich sei. Die erste und wichtigste Begründung war, daß die ZÖO keine derartige Tätigkeit ausübt, für welche Gegenwert berechnet werden könnte. Diese Organisationen üben ihre Tätigkeit auf einem Gebiet der Wirtschaft aus, der nicht in die Sphäre der Wirtschaftung fällt. Die vorhin genannten Aufgaben der ZÖO betrachtet ist das durchaus einleuchtend.

Im Zuge der Untersuchungen stellte es sich heraus, daß für den Produktenaustausch vielleicht ein Gegenwert berechnet werden könnte, dies würde aber die ZÖO zu einer Quasi-Handelsvertretung umformen, das aber dem Charakter der Organisation widerspricht. Es ist völlig überflüssig für eine derartige Aufgabe eine völkerrechtliche Rechtsperson zustande zu bringen, andererseits kann aber der Produktenaustausch als Tätigkeit gar nicht geplant werden.

Auch die wissenschaftliche Forschung kann nicht als Basis der wirtschaftlichen Rechnungsführung gelten, denn das bedürfte einer äußerst großen Kapitalkraft, und auch diese Tätigkeit kann nicht als das Wesen der ZÖO betrachtet werden.

[17] Ausführliche Darlegung siehe: *Vállalatirányítás és vállalatok jogi helyzete* (Unternehmenlenkung und die rechtliche Lage der Unternehmen). Band II, Budapest, 1976, pp. 24 et seq.; pp. 220 et seq.

Sollten aber unmittelbar Unternehmen in die Mitgliederschaft der ZÖO einbezogen werden, dann deformiert sich wieder die ZÖO, ist doch die Aufgabe derselben die Koordination bestimmter Gebiete der Volkswirtschaft auf allgemeiner Ebene und nicht die konkrete Abstimmung der Unternehmentätigkeit. Diese letztere Tätigkeit bildet die Aufgabe der internationalen Wirtschaftsvereinigungen. Der organisatorische Formenreichtum der Integration darf nicht formell werden.

Eine interessante Erscheinung war aber zu beobachten, als die Frage der wirtschaftlichen Rechnungsführung auf die Tagesordnung gesetzt wurde. Von der ausdrücklichen Einräumung der Lenkungsbefugnisse für die Organisation selbst war nie die Rede, obwohl bei einer Koordinierungstätigkeit auf dieser Ebene nur der Begriffspaar Wirtschaftung-Wirtschaftslenkung denkbar ist. Im Vorschlag zur Umschaltung auf die wirtschaftliche Rechnungsführung wurde aber von diesem Paar nur die eine Seite erfaßt. Deshalb führte die Untersuchung bei sämtlichen Organisationen zum Ergebnis, daß eine Wirtschaftung nur unter grundlegender Veränderung der Tätigkeit denkbar sei.

7. Die inneren Beziehungen der ZÖO

Die Funktion und das Ziel der ZÖO können nicht von außen her verwirklicht werden. Die obigen Widersprüche können vermieden werden, wenn bei der Regelung nicht ausschließlich der internationale Charakter der Organisation in Betracht gezogen wird. Bei der Gestaltung und Betätigung der Institution muß darauf Rücksicht genommen werden, was die Realität ist, nämlich, daß eine nationale Absonderung tatsächlich existiert, woraus folgt, daß an der Organisation Mitglieder mit abweichenden Interessen beteiligt sind.

Das Wesen der die effektive Lage berücksichtigenden Lösung besteht darin, daß die ZÖO in den nationalen Entscheidungsmechanismus eingeschaltet werden müssen. In erster Linie und grundlegend ist das nationale Interesse entscheidend.

Die Alleinherrschaft des nationalen Interesses birgt freilich die Möglichkeit in sich, daß sie den Rahmen der durch die Organisation zustandegebrachten Kooperation zersprengt, und zwar wegen der völlig verschiedenen Interessen der Mitgliedstaaten.

Die Interessengegensätze werden aber die Kooperation dort bestimmt nicht hindern, wo das auf die Kooperation gerichtete gemeinsame Interesse stärker ist, als das nationale Interesse, oder diesem wenigstens gleich ist. Das heißt, die Kooperation entsteht nur an jenen Gebieten — dort handelt es sich aber um eine Kooperation im wahren Sinne des Wortes, — wo der wirtschaftliche Anspruch real ist. Das Schema der Entscheidungen ist folgendes: 1. Entscheidung der nationalen Organe: die Ausarbeitung von Entscheidungsalternativen vonseiten der Wirtschaftslenkungsorgane, entsprechend den Volkswirtschaftsinteressen; 2. in den ZÖO abgestimmte und harmonisierte gemeinsame Entscheidung im Rahmen der seitens der Mitgliedstaaten

vorgelegten Alternativen; 3. Durchführungsphase aufgrund der Entscheidungen der nationalen Organe.

Im Fragenkomplex des Entscheidungsmechanismus liegt das wichtigste Problem bei dem ersten Glied der Entscheidungsphase. Bei der Beteiligung an der ZÖO fehlt nämlich die volkswirtschaftliche Betrachtungsweise. Die Beteiligung an den ZÖO wird auf die auch im übrigen veralteten Zweige angelegt.[18] Es ist eine bedauernswerte Tatsache, daß nicht die inhaltliche Änderung dazu führte, daß die Benennung dieser Organisationen von zweiglichen Kooperationsorganisationen auf zwischenstaatliche ökonomische Organisationen umgetauscht wurde. Die inhaltliche Änderung ist derzeit bloß ein frommer Wunsch, eine zu lösende Aufgabe.

Der Hinweis auf die Zweige ist aus mehrerer Hinsicht eine widerspruchsvolle Lösung. Es ergibt sich aus der Ebene der Koordination, daß in den Fragen volkswirtschaftlichen Niveaus Entscheidungen gefällt werden müssen, selbstredend aufgrund des nationalen Interesses. Anstelle dieses Interesses tritt aber das Zweigsinteresse, das ist es was zum Ausdruck kommt, es erscheint aber gleichzeitig, als es in Wolkswirtschaftsinteresse wäre. Formell scheint es Volkswirtschaftsinteresse zu sein, was inhaltlich Zweigsinteresse ist.

Noch kräftiger meldet sich dieser Widerspruch wenn die ZÖO das Vertikum der Tätigkeiten umfaßt, und die einzelnen, in die Koordination einbezogenen Tätigkeiten ihrem Charakter nach zu verschiedenen Volkswirtschaftszweigen gehören. Ein gutes Beispiel ist dafür die AGROMAS, das sämtliche Stufen der Herstellung der landwirtschaftlichen Maschinenindustrie koordiniert (Forschung, Spezialisierung, Produktion, Verwendung). Dementsprechend müssen in den nationalen Sektionen der Organisation Vertreter von mehreren Volkswirtschaftszweigen zugegen sein (Ministerium für Landesernährung, Ministerium für den Außenhandel, Ministerium für Industrie). Bei einer derweise aufgebauten und mehrseitig beteiligten Organisation ist die Lenkung der ungarischen Sektion einem einzigen Zweig zugewiesen. Aufgrund der gegenwärtigen Konstruktion wird die Stellungnahme des Landes seitens der nationalen Sektion einheitlich geformt. Die Abstimmung der Meinungsverschiedenheiten der Zweige wird prinzipiell anhand der Konsultationen der Delegationen vor der Ratssitzung vorgenommen. Diese Meinungsverschiedenheiten sind aber die unvermeidlichen Äußerungen der abweichenden Zweigsinteressen. Die Existenz der abweichenden Zweigsinteressen braucht nicht bewiesen zu werden, aber auch das nicht, daß in den Rahmen der nationalen Wirtschaft die Kompromißbereitschaft der Zweige untereinander nicht besonders stark ist. In der Tätigkeit der nationalen Sektion sind die Kompromisse fördernde Mechanismen nicht ausgearbeitet. In der Sektion kommt die Lenkung des einen Zweiges zur Geltung und mit einer milden Übertreibung können wir so behaupten, daß dieser Umstand die Möglichkeit der ausschließlichen

[18] Über die Probleme der zweiglichen Lenkung siehe: BAUER, T.-SZAMUELY, L.: *Az ipar-ágazati irányítás szerkezete az európai szocialista országokban; néhány tanulság* (Konstruktion der zweiglichen Lenkung der Industrie in den europäischen sozialistischen Ländern; einige Konsequenzen). Közgazdasági Szemle, 1971, 1, pp. 28 et seq.

Entscheidung in sich trägt. (Anhand der Durchführung der Aufgaben bedeutet dann ein Problem, wenn der leitende Zweig in die Tätigkeit des anderen Zweiges „sich hineinmischt".) Eine Betrachtungsweise auf Volkswirtschaftsniveau, die die Übereinstimmung unter den Zweigen — wenn auch zwangsweise — ermöglichen würde, ist aber nicht vorhanden. Anstatt dessen kommt — wie wir gesehen haben — das Primat jenes Zweiges zur Geltung, zu welchem die ZÖO nach ihrer Haupttätigkeit gehört.

Deshalb ist das erste Glied des Entscheidungsmechanismus verfehlt. Es kommt eine Entscheidung zustande die unlösbare Widersprüche in sich trägt, und diese Entscheidung wird dann auf internationaler Ebene „abgestimmt", — im Rahmen der ZÖO.

In der dritten Rückkuplungsphase tritt dann wieder die Durchführungsentscheidung der nationalen Organe in den Gang der Dinge ein, damit sich die gemeinsamen Vorstellungen verwirklichen können. Die Phase der Durchführung stockt aber. (Die Lenkungskonzeption will diese Phase im Interesse der erfolgreichen Funktionierung ausschalten.) Dementsprechend ist es schwer, wenn nicht unmöglich, die wahren Wurzeln der Probleme zu ermitteln. Die nicht zur rechten Zeit ermittelten Interessengegensätze bringen bereits eine Reihe von akzessorischen Problemen mit sich. Die Fehler häufen sich, und die Ermittlung der Gründe der unerwünschten Erscheinungen, geschweige denn die Abschaffung dieser Gründe, wird unmöglich. Die selbstgesetzliche Funktionierung des Zweigsystems kann nicht beeinflußt werden. Es wirkt unbedingt deformierend, wenn die Entscheidungen mit genügender Umsicht, nicht an jener Ebene zustandekommen, die berufen wäre diese Entscheidungen zu vertreten.

Komplexe Aufgaben können nur dann gelöst werden, wenn die Lenkung sich eine komplexe Betrachtungsweise zu eigen macht. Die Leitung der Zweige ist zur Lösung dieser Aufgaben objektiv ungeeignet. Die Nichtauflösung der Widersprüche entspringt aber nicht der vernachlässigsten Handhabung der Integrationsprobleme. Der Grundfehler steckt darin, daß in unserem Wirtschaftslenkung-Organisationssystem ein Organ mit entsprechenden Eigenschaften, das dazu notwendig wäre, überhaupt nicht existiert. Der Träger der volkswirtschaftlichen Betrachtungsweise und der Koordinator der verschiedenen Interessen ist die Regierung, aber ihre Aufgaben haben — unter den gegenwärtigen Umständen — nicht einen derartig operativen Charakters, daß sie die inhaltlichen Aufgaben einer Beteiligung an einer internationalen Organisation versehen könnte. Aber die Beteiligung an der Integration beansprucht eine komplexe politisch-wirtschaftliche Betrachtungsweise zwischen (oder sogar über) den volkswirtschaftlichen Zweigen. Die Lösung dieser neuartigen Aufgaben ist im alten Rahmen, zumindest nach einer gewissen Stufe, nicht mehr möglich. Es müßte die Einheit des Inhalts und der Form verwirklicht werden, da daß ja schon durch unsere Teilnahme an der Integration erforderlich ist. Andererseits könnte dadurch gesichert werden, daß wir tatsächlich nur an jenen Gebieten in eine internationale Kooperation hineingehen, wo das für die Volkswirtschaft unbedingt notwendig und wirtschaftlich begründet ist.

8. Die Einbeziehung der Unternehmen in die ZÖO

Eben im Interesse der Überbrückung der auf der Ebene der Lenkung auftauchenden Probleme war in der nahen Vergangenheit die unmittelbare Einbeziehung der Unternehmen in den Tätigungsbereich der ZÖO zu beobachten.

Die Kräftigung dieses Prozesses wurde von verschiedenen Faktoren gefördert. Einerseits nahm infolge der in den sozialistischen Ländern vor sich gehenden Wirtschaftslenkungsreformen die Selbständigkeit der Unternehmen mehr oder minder zu und die Einbeziehung der Unternehmen in die ZÖO ging formell als die Steigerung der Selbständigkeit der Unternehmen vor sich.

Andererseits aber gewann diese Erscheinung vonseiten der Vertreter der Lenkungskonzeption eine theoretische Unterstützung, die bestrebt waren auch die Durchführungsphase in den internationalen Wirkungskreis einzubeziehen, um dadurch gleichzeitig den Unterschied zu verringern, der zwischen der Vereinigung zur Koordinierungstätigkeit der ZÖO und IWO besteht.

Die unmittelbare Einbeziehung der Unternehmen in die Tätigkeit der ZÖO kann aus mehreren Gründen nicht als erfolgreich betrachtet werden. Vor allem kann diese Lösung aus Lenkungsgründen beanstandet werden, da sich dadurch in den ZÖO der früher bereits kritisierte Zweigscharakter noch weiter verstärkt, und zwar wegen der zweiglichen Gebundenheit der Unternehmen.

Von einem Unternehmen kann wohl kaum eine komplexe politisch-wirtschaftliche und volkswirtschaftliche Betrachtungsweise erwartet werden. Das ist auch nicht seine Aufgabe. Die Makroentscheidungen der Lenkungsorgane können nicht mit den Entscheidungen von Organisationen, die ihre Tätigkeit auf Mikroebene ausüben, ersetzt werden.

Das charakteristische Beispiel zur Vergegenwärtigung dieses Problems ist die Organisation zur Kooperation der Achsenlagerindustrie. In dieser ZÖO erhielten die Ungarischen Rollagerwerke Entscheidungsberechtigung. Durch das Erscheinen des Unternehmens und durch seine Vorherrschaft in der Organisation erschienen auch die typischen Unternehmenprobleme, z. B. die Bestrebung zur Erlangung des selbständigen Außenhandelsrechts, ferner die Bemängelung dessen, daß zur gemeinsamen Investitionen keine Möglichkeiten bestehen. Diese Bestrebungen sind bei einem profitinteressierten Unternehmen völlig verständlich. Es taucht aber die Frage auf, ob es nicht begründet wäre auf die IWO-Form überzugehen, besonders, wenn wir betrachten, daß die Ungarischen Rollagerwerke in Ungarn eine Monopollage genießen, und daß die Achsenlagerindustrie auch in den anderen sozialistischen Ländern ebenso zentralisiert ist. Es sei noch erwähnt, daß eben durch die Monopollage der Widerspruch, daß ein Unternehmen einen Zweig, ja die volle Volkswirtschaft vertritt, nicht in die Extreme getrieben wird. Denn die typischen ZÖO-Funktionen sind bei der Organisation zur Kooperation der Achsenlagerindustrie auch vorhanden, z. B. als Ergebnis der Spezialisierungen die Aufrechterhaltung des Export—Importgleichgewichts usw., aber parallel damit melden sich auch schon die durch das

Unternehmeninteresse bedingte, ausschließlich für die Mikroebene charakteristische Bestrebungen.

Über die ZÖO-Mitgliederschaft der Unternehmen kann auch aus anderen Gesichtspunkten nichts anderes behauptet werden. Es ist zu beanstanden, daß der Staat durch ein Unternehmen vertreten wird. Zur Vertretung des Staates, zur Eingehung von Verpflichtungen im Namen des Staates sind nur staatliche Organe befugt. Es ist nicht ausgeschlossen, daß aufgrund einer „Ermächtigung" ein Unternehmen den Staat vertritt, das kann aber nicht zur allgemeinen Praxis führen. Es müßte die Tendenz der Mechanismusreform von 1968 respektiert werden, daß die Sphäre der Wirtschaftung und der Wirtschaftsleitung getrennt werden soll. Es scheint, daß dieses Prinzip auf dem Gebiet der ZÖO nicht konsequent durchgesetzt werden konnte. Trotz dessen, daß besonders in internationalen Beziehungen, oder im Interesse derselben der Abstand von diesem Prinzip, oder die Einschränkung derselben durchaus nicht undenkbar sind, diese „Abweichungen" können aber nur dann gebilligt werden, wenn die Aufrechterhaltung der Beziehungen anders nicht verwirklicht werden kann. Es scheint zweckmäßig vorerst nach anderen Lösungen zu fahnden.

Es ist nämlich zur Zeit nicht selten, daß der Leiter eines im internationalen Beziehungen Rolle spielenden Unternehmens als Vertreter des Staates Abkommen schließt. Und als Leiter eines Unternehmens eine unternehmenzentrische Betrachtungsweise besitzt. Daraus folgt, daß der entsprechende Ausdruck des Volkswirtschaftsinteresses auch auf diese Weise nicht gesichert werden kann.

Auf jenen Gebieten, wo an der Tätigkeit der ZÖO mehrere Unternehmen beteiligt sind, bedeutet die Vertretung auf Unternehmensebene noch größere Sorgen. In derartigen Fällen streiten sich nicht nur abweichende zweigliche, sondern auch abweichende Unternehmeninteressen innerhalb einer zwischenstaatlichen Organisation.

Damit wollen wir nicht behaupten, daß die Interessen der Unternehmen außer Acht gelassen werden sollen, sondern daß ihre Beziehungen zu den ZÖO in entsprechender Form, durch wohlgeformte innere Regelung gesichert werden sollen. Es steht außer Zweifel, daß die Verkoppelung der Entscheidungen der Makro- und Mikrosphäre eine der wichtigsten Vorbedingungen der erfolgreichen Zusammenarbeit ist,[19] das ist aber eine Frage der inneren Wirtschaftslenkung, und kein Problem der RGW-Integration.

Die Verkoppelung kann dann verwirklicht werden, wenn die Entscheidung auf Makroebene auf einer hohen Stufe der Hierarchie vor sich geht und die volkswirtschaftliche Betrachtungsweise zur Geltung kommt. Andererseits muß aber auch auf der Ebene der Durchführung die Einheit gesichert werden. Aus dieser Feststellung mag vielleicht der Anspruch auf eine Konzentration der Unternehmen herausklingen

[19] Rácz: op. cit. p. 141.

und dieses Gefühl ist auch nicht falsch. Wenn dieser Umstand dem Volkswirtschaftinteresse entspricht, muß diesem Anspruch Geltung verschafft werden.

Es ist Tatsache, daß die an der Spezialisierung teilnehmenden Produktionsunternehmen an der Integration nicht erfolgreich beteiligt sein können, wenn sie ihr Verhalten in der Integration nicht mit Hinsicht aufeinander gestalten. Ein Ergebnis der unbeeinflußbaren Unternehmenverhalten ist, daß z. B. die Spezialisierungsabkommen deshalb nicht zustande kommen können, weil sich die Unternehmen weigern solche Abkommen zu schließen. Ihre Weiterungen sind durch rationale wirtschaftliche Überlegungen erklärbar. Den in Gewinninteressiertheit arbeitenden Unternehmen bietet die Teilnahme an der Spezialisierung keinen Gewinn, ja es bedeutet vielleicht einen Verlust, trotz dessen, daß sie für die Volkswirtschaft unbedingt von Vorteil wäre.

Das sind nur herausgegriffene Beispiele, eine ausführliche Untersuchung der Tatsachen würde auf Widersprüche an vielen anderen Gebieten ein Licht werfen. Das ist jedenfalls auffallend, daß die Integration zur Kollision zwischen den Volkswirtschafts- und Unternehmeninteressen reiche Beispiele aufweist, und das kann nicht als Zufall aufgefaßt werden.

Im Zuge dieser Kollisionen gelangt das Volkswirtschaftsinteresse dem Unternehmeninteresse gegenüber in nachteilhafte Lage. Anhand einer ganzen Reihe solcher Beispiele sind wir dort angelangt, daß wir die Vereinheitlichung der Sphäre der Durchführung, die Konzentration der Unternehmen vorschlagen.

Dieser Vorschlag widerspricht ohne Zweifel den ansonsten unterstützungswürdigen Vorstellungen der Wirtschaftslenkungsreform. An gewissen Stellen wünscht aber die Teilnahme an der internationalen Kooperation, daß auch mechanismusfremde Lösungen akzeptiert werden.

Wenn die Entscheidung über die Teilnahme an der Integration an hoher Stufe getroffen wird, das ist dann auch eine Garantie dafür, daß die Kooperation tatsächlich dem Volkswirtschaftsinteresse entspricht.

Die sozialistische Integration ist, die Elemente und Methoden ihres Wirtschaftsmechanismus betrachtet, zentralbedingt, wie auch die Wirtschaftslenkungssysteme der meisten sozialistischen Länder so beschaffen sind. Die ungarische Wirtschaftsreform ist in ihren Prinzipien und Methoden von den anderen abweichend, es ist also eine grundsätzliche Frage, wie weit die Staatsverwaltungsmittel im Interesse der Teilnahme an der Integration angewendet werden können bzw. müssen. Wenn an gewissen Gebieten Unternehmen konzentriert werden müssen, soll das getan werden, wenn es übrigens für die Volkswirtschaft vorteilhaft ist. Die Integration hat Vor- und Nachteile, deshalb soll unter gründlicher Analysierung klargelegt werden, ob aus der internationalen Zusammenarbeit ein solcher Vorteil entsteht, daß es sich lohnt „systemenfremde" Lösungen anzuwenden.

Основные правовые вопросы межгосударственных хозяйственных организаций

М. Балажхази

Статья занимается организационной системой интеграции СЭВ, точнее межгосударственными хозяйственными организациями. Анализирует недостатки международно-правового урегулирования и их последствия, а также теории, связанные с направлениями развития межгосударственных хозяйственных организаций. В ходе исследования функционирования межгосударственных хозяйственных организаций она анализирует механизм вынесения решения межгосударственными хозяйственными организациями, и в связи с этим недостатки, имеющие место на практике. Наконец, занимается членством венгерских хозяйственных организаций и органов по руководству хозяйством в межгосударственных хозяйственных организациях.

On fundamental legal questions of interstate economic organisations

M. Balásházy

The paper deals with the organizational system of the CMEA integration and particularly with interstate economic organizations. The shortcomings of the international legal regulation are analysed and also the theories concerning the developmental trends of these organizations. The functional analysis of the author emphasizes the decision-making procedures and their practical inconveniences. The last part of the article deals with the membership in interstate economic organizations of Hungarian economic and management organizations.

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The field of application and the rules of interpretation of ULIS and UNCITRAL conventions

Prof. L. RÉCZEI

The diplomatic conference held in Vienna from the 10th of March till the 11th of April 1980 has elaborated the TEXT of an international convention on Contracts for the International Sale of Goods. The TEXT was preceded by the Hague Convention on the same matter, known as ULIS. The TEXT of the Vienna Convention contains the following provision in para 3 of Article 99:

> "A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by Notifying the Government of the Netherlands to that effect."

By this provision the Vienna Convention—very correctly—intends to avoid conflicts between the two Conventions. No state can be a party to both of them. By separating the Contracting States of the two Conventions does not mean, however, that the application of the two Conventions, i.e. their territorial effect is equally separated. Both will remain in force and both are applicable not only to contracts of businessmen from States parties to one or other Convention, but to contracts concluded by parties having their places of business in States not ratifying any of these Conventions.

Hence as long as the 1964 Hague Conventions will be in force they may be applied on international sales contracts regardless whether the countries of the parties to such a contract have their places of business in countries parties to the Hague Conventions, or in countries acceding to the UNCITRAL Convention or in countries which acceded to none of them. This is why it seems to the author of this study that a comparison between the two Conventions might be useful for people interested in the international trade.

The Hague Conventions were not yet in force when the UNCITRAL accepted in its working program the elaboration of a new draft on a uniform law on sales. Although UNCITRAL adopted the text of ULIS as a basis of its own draft, the two texts differ in some points significantly. This paper analyses the similarities and differences only from the aspects of the field of application and the rules of interpretation of the two Conventions.

Both texts intended to satisfy the need of universality: the application of the law should be extended to the possible largest sphere, therefore they exclude or at least severely limit the role of national laws, as well as the rules on conflicts of laws, recognize the autonomy of the parties and the optional character of the uniform rules.

The UNCITRAL text is simpler, its sanctions are more moderate; there is a difference as to the types of transactions taken out of the Convention.

As to the field of application the paper concludes by stating that the UNCITRAL text is narrowing the scope of the rules as compared to ULIS, but widens the sphere of contracts subject to it.

As to the regulation of interpretation the main difference is that when interpreting ULIS the judge shall turn only to the basic principles of the Convention, thus there is no legal source outside the

text to fill a gap, while the UNCITRAL TEXT allows the judge to turn to the law to be applied according to the conflicts rule. Otherwise both texts give great liberty to the judge in interpreting the texts and this fact may give rise to the danger that the uniform text might applied in different sense due to differing interpretations.

I. The antecedents of the UNCITRAL text.*

It was debated on in the third session of UNCITRAL in 1970, how the Working Group appointed in the year before should proceed to the elaboration of the convention on the international sales of goods. The discussions centered round the wording of the Convention approved at the Hague on the subject matter in 1964. The delegations of a number of countries took part in formulating the Hague text (hereinafter ULIS) which now as members of the Working Group undertook the formulation of a new convention. There were several delegations which thought that the text of ULIS was unacceptable even as the underlying instrument of the discussions and brought forward suggestion for the elaboration of a wholly new, unambiguous, concise wording. Other delegations voiced that the Working Group should set out from the text of ULIS, and that until the new wording was completed UNCITRAL should bring forward recommendations to the member-states of the United Nations to ratify ULIS in its present form.[1]

Eventually UNCITRAL agreed that the wording of ULIS was appropriate for serving as the underlying document for the elaboration of a uniform convention on sales which would be acceptable for a considerable majority of states. Consequently the elaboration of the wording began as the revision of ULIS and the session advised the Working Group that 'Instead of selected items the Working Group should consider ULIS systematically, chapter by chapter, giving priority to Articles 1–17.[2]

(2) The doubts as to the wording of ULIS were not wholly unfounded. At that time ULIS was not yet in operation, for until 1970 only three states have ratified it.[3]

It was only after the fifth ratification that ULIS came into operation on the 18th August, 1972, and the assumption cannot wholly be dismissed that ratification and operation were to some extent accelerated by the work UNCITRAL had taken up.

On the other hand it is possible that exactly the work UNCITRAL began detained other governments from the ratification of ULIS thus forestalling the birth of a highly complicated legal situation which might be brought about should a definite country become the signatory to two 'uniform' and 'universal' conventions, to conventions namely which would bring under regulation one and the same question in a divergent form.[4]

* UNCITRAL draft, (or draft) means the text elaborated by UNCITRAL and submitted to the Diplomatic Conference held in Vienna in 1980. TEXT means the draft convention adopted by this conference. ULIS is already known as meaning the convention adopted in the Hague in 1964.

[1] Yearbook, vol. I, p. 132

[2] Yearbook, vol. II, p. 51

[3] The United Kingdom, San Marino, Belgium

[4] So far ULIS has been ratified by nine states

It cannot be doubted, however, that opinions differ as to the applicability and utility of ULIS.[5] Still, by the fact that through the accession of nine states ULIS has come into operation, this instrument in a high measure excels among the conventions signed in the latter quarter of a century, conventions namely which has as their goal the settlement of yet other questions associated with international sales and which had not come into operation to the present day.[6]

(3) It is not the objective of the present paper by weighing the pros and cons of ULIS to come to any definite conclusions. Although as participant of the Hague Conference the present author has been impressed differently, he would nevertheless agree with Professor *André Tunc* that ULIS is the product of creative activities rather than of a compromise.[7]

Still practice tends to demonstrate that Professor *Tunc* has exaggerated the significance of the positive opinions formed of ULIS.[8] The *rigor commercialis* which ULIS has luckily brought closer to the law merchant of the most developed capitalist countries has had a deterrent effect on the developing countries which have become connected with world trade only of late.[9] Ratification of ULIS would stumble upon difficulties even in the socialist countries. The approach which would have the termination of the contract as the first sanction of a breach of contract cannot be reconciled to planned economy whose targets can be achieved by the performance of the contract and not by its termination.

II. Principles and their invalidation

(4) The principles which prevailed in the conference drawing up ULIS have served as guidance also for those formulating the UNCITRAL draft. Such principles are e.g. the yet wider application of the convention, and what follows from it: the restricted recourse to the municipal laws, the exclusion of the conflicts of laws, the full, or nearly full, autonomy of the parties, in the hierarchical order the contract, custom, etc. precedes the uniform law, etc.

All these principles have, however, forfeited some of their force by the circumstance that the wording of ULIS has opened the gates to reservations of which

[5] See Eörsi, Gy.: *The Hague Conventions of 1964 and the International Sale of Goods*, Acta Juridica, 1969

[6] A few of the conventions of the Hague Conference: 1958: transfer de la propriété; compétence du for contractuel; 1955: conflits entre la loi nationale et domicile; 1956: reconnaissance de la personnalité juridique; 1965: l'election du for, etc.

[7] Tunc, A.: *Commentary*, p. 8. Similarly Riese, O. in 1964 supplement of Int. and Comp. Law Quarterly and Szakats, A. ibid., year 1964, p. 751.

[8] The uniform law has appeared not only acceptable, but positively good to experts belonging to very different legal and political systems. *Commentary*, p. 16.

[9] Nor is there any attempt to make rules to aid the weak and ignorant or inattentive, like the rules of the Sales article of the Uniform Commercial Code . . . .Honnold, J.: *The Hague Convention of 1954.* (Issue of Law and Contemporary Problems . . . 1965, Durham N. C., p. 335.)

the signatories can at their option select such as would relegate the applicability of the convention to exceptional cases. International conventions as a rule set up barriers to the operation of the municipal law. A legal relationship coming within the sphere of an international convention cannot be governed by the municipal law. This is the case even more with conventions which have as their goal the unification of law. If the convention gives way to reservations which disagree with this goal, this might lead to the frustration of the convention, still in any case they will retard the process of unification.

(5) Of the reservations of the Convention in particular the one incorporated in Article V deserves special mention. This reservation does not only prevent the application of the uniform law within as wide as possible a domain, but even calls into doubt the efficacy of the law as law by the circumstance that the application of the uniform law of sales has been made dependent only on the express contractual stipulation of the parties.[10]

A law will become a law by its automatic application. Permissive law is permissive only for the parties, for the judge such a distinction is unthinkable. He will be bound by all laws with equal force. Still permissive law will bind him only if the parties have not agreed to the contrary in their contract. Still in matters not provided for by the contract the law will automatically settle the situation of the parties. If the judge cannot apply the law unless the contract of the parties permits him to do so, the judge will observe the law due to the will of the parties and not that of the State, i.e. in the same way as any other contractual stipulation of the parties. By this ULIS has become a certain type of contract, not even 'foreign law', for foreign law may be chosen by implication, yet according to this reservation ULIS requires express choice.[11]

(6) The prevention of the automatic application of the uniform law even haunted during the elaboration of UNCITRAL text. An amendment came to be brought forward according to which the law 'would apply to a transaction only if it was made so applicable by the parties...'[12] One of the member-states pointed out in its comments that 'states could be reluctant to accede to the Convention, if its application is automatic ...'[13] and suggested to supplement the wording by the words 'by express statements.'

The Working Group did not though admit the recommendations, still this indicates that the universal acceptance of the UNCITRAL draft will not be plain

[10] There was an almost unanimous opposition to Article V of the Convention ... It was stated, among others, that this reservation was inconsistent with the purpose of the Convention ... that it was inadmissible to subordinate the Uniform Law to the will of the parties ... KATONA, P.: *The second session of UNCITRAL*, Journal of World Trade Law, 1969, p. 564

[11] paragr. (3) of Article I of the Uniform Law on International Sales Act 1967: While an Order of Her Majesty in Council is in force declaring that a declaration by the United Kingdom under Article V of the First Convention (application by choice of parties) has been made and not withdrawn the Uniform Law on Sale shall apply to a contract of sale only if it has been chosen by the parties to a contract as the law of the contract.

[12] Doc. A/CN/9/126, p. 7

[13] Doc. A/CN/9/125, p. 6

sailing. The question was whether the contract should be made subject to the uniform law, or whether the application of the uniform law should be made dependent on the will of the parties.

(7) This issue is not the counterpart of the one whether or not the parties may preclude the application of the uniform law (Article 6 of the TEXT). This namely amounts to the recognition and the reinforcement of the autonomy of the parties empowering them to determine the law governing the contract (and by this preclude the application of another law). By their precluding the application of the convention by virtue of Article 6 of the TEXT the parties subject their contract to the applicable law in conformity with the conflict law of the forum. And the application of this law takes place automatically, provided that the parties have not precluded the application of the convention by recourse to another law.[14]

Still if the court of the country of one or the other signatory to the convention cannot apply the convention unless the parties agree thereto in their contract, then notwithstanding the convention the judge will automatically apply the municipal law whose scope of operation exactly the convention intends to restrict.[15]

(8) The judicial practice of the courts of the Federal Republic of Germany serves the ends of universality more efficiently. In the opinion of this author the courts correctly give a restrictive interpretation of Article 3 of ULIS.

In a given case the contracting parties have stipulated the municipal law of the Federal Republic of Germany as the law governing their contract, but have failed to specify whether they subject their contract to the municipal law of the Federal Republic or to ULIS. The court has applied ULIS.[16] In other cases the court did not consider ULIS precluded by the parties, which appeared from the fact that the parties did not even know of the existence of ULIS when they had made their contract.[17]

[14] The non-mandatory character of the Convention is explicitly stated in Article 5. The parties may exclude its application entirely by choosing a law other than this Convention to govern their contract. (A/CN/9/116–Annex. II. p. 9)

[15] The constitutions of a number of countries state that due to the mandatory character of treaties and conventions they precede the municipal law. In our opinion, no law is stronger than another promulgated by the same legislator. A municipal provision bringing under regulation a definite legal relationship is a general rule, a treaty or convention relating to the same legal relationship is in relation between the contracting states or their nationals a special rule. Hence the priority of a treaty or convention derives from the thesis of Roman law that *lex specialis derogat generali*. The legislator by ratifying a treaty or convention throws difficulties in the way only to its amendment or rescission: as long as his country is signatory to the treaty or convention, it has to be applied and a change can be effected only in agreement with the other contracting states. The reservation in art. V of ULIS has degraded ULIS: it is with neither municipal law nor any other international instrument on an equal footing in the hierarchical order of sources.

[16] Im Zweifel kann deshalb die Wahl des Rechts eines Vertragsstaates nicht als Ausschluß der einheitlichen Gesetze gewertet werden. Landsgericht Landshut, 4.07.76. Unidroit Revue, 1977, vol. II, p. 267

[17] Ibid., p. 271

III. The Uncitral TEXT

(9) The TEXT of UNCITRAL is more concise, and though its sanctions are not milder, the regulation serves better its end, namely the preservation of the validity of the contract. In other words the authors of the TEXT have tried to find other solutions for those which detained the developing and the socialist countries from acceding to ULIS. The Swedish gorvernment, whose delegation had a prominent role in the elaboration of ULIS in its comments on the draft admits that "the draft must be regarded as a considerable improvement on the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS)".[18]

(10) UNCITRAL has instructed the Working Group it has appointed in the course of a revision of the text of ULIS to give priority to Articles 1–17.[19] These Articles define the scope of application of the Uniform Law and the rules to be observed at its interpretation. The UNCITRAL TEXT settles these questions in its Articles 1 to 12. In both instances Article 1 provides the positive conditions for application. A comparison of the two would be even more useful if we kept in mind the ends and principles which guided the makers of ULIS. Such are e.g. the achievement of the accession of the possibly largest number of countries, the application of the convention even when the states of the contracting parties have not ratified it, the non-mandatory character of ULIS, the guarantee of the unity of interpretation, in this respect the preclusion of the application of both the law of the forum and of the law governing the contract according to the conflict rules. It is the consequence of the permissive nature of ULIS that any stipulation relying on the express, tacit, or implied agreement of the parties has priority before the provisions of ULIS. The statement may, therefore, ba made that ULIS is the last member of a hierarchical sequence. In the hierarchical sequence the following have priority before ULIS:

(1) the contract of the parties;
(2) the practices established in the dealings of the contracting parties;
(3) usages, international or national;
(4) the expressly or impliedly accepted standard forms;
(5) in the event of Article 4 of ULIS all municipal mandatory rules which would be applied had not the parties subjected their contract to ULIS;
(6) thereafter recourse may be had to ULIS as a residuary set of rules.

Basically, this hierarchical order is in agreement with the situation in the majority of states. What gives rise to misgivings in the case of ULIS is the "international" character of the legal relationship and the want of established and concise definition of commercial usages. Section 2 of Article 9 does not distinguish between the usages of the home market and those of an international character and opens the gate to recourse to a usage which was known perhaps to neither party, if contracting parties in general applied this usage to their contract. The expedient was

[18] A/CN/9/125. Add. 1; similarly Finland A/CN/9. 126. p. 12
[19] See Note 2

sharply criticized by Yugoslavia in the debate on the UNCITRAL text,[20] and by Professor *Eörsi* in the analysis of ULIS.[21]

If now to this we add the reservations ULIS recognizes we may have a fair idea of the circumstance that the law of international trade compiled with the idea of universality may be resorted to in practice in exceptional cases only.

IV. The sphere of application of ULIS and the TEXT

(11) Article 1 of ULIS makes the application of the uniform law dependent on the joined presence of subjective and objective conditions. The subjective condition demands that the places of business of the contracting parties should be in different countries irrespective of the nationality of the parties and of whether these countries are signatories or not. The presence of a single of the three objective conditions by the side of the subjective condition suffices. The three conditions are (1) carriage of goods from one country to another; (2) offer and acceptance have been effected in the territories of different States; (3) the goods must be delivered to a country other than the one where offer and acceptance have been effected.[22]

V. Application by way of conflict rules

(12) It is an item in the historical past of the ULIS text that according to earlier drafts, before 1964, the uniform law will be applicable only when in conformity with the conflict rule of the forum the law of a State has to be applied which is signatory to the convention.

According to this earlier concept the mechanism would have operated as follows: above all the forum settles the conflict in conformity with its own municipal conflict law or with rules based upon an international convention. If these suggest the law of a country which is signatory to the convention, then recourse will be had to ULIS and not to the general rules of sales of the respective country. This is of necessity followed by a question of qualification: it has to be decided whether the deal of the parties amounts to a sale contract coming within the purview of ULIS. Naturally this can be decided only on the grounds of ULIS (secondary qualification) and if the decision is a positive one the dispute can be settled in its substance.

[20] A/CN/9. 125. p. 59

[21] The solution adopted in respect of permissivenes and usages is basically correct but operates in an unavoidable *manner against the unification of law; it diminishes the chances to foresee the applicable law; the stronger party benefits from it.* (Op. cit. p. 338) (Ital. by author)

[22] In reality, there is yet another objective condition namely that the law can be applied only to contracts of sale of goods. Article 1 does not define the notion of sale of goods, still it defines when the contract should be considered international. Instead of a positive definition articles 5 and 6 approach the notion of the sale of goods by a method of exclusion. It sets out perhaps from the thesis that *omnis definitio est negatio.*

VI. Application by exclusion of the conflict rule

(13) The conference of 1964 thought that this solution was fraught with a high degree of complexity and by accepting the recommendation of the Federal Republic of Germany decided that the application of ULIS should be achieved without recourse to the conflict rule. The delegation of the Federal Republic of Germany proposed that the courts of the contracting states should apply ULIS to international sales by setting aside any other question. This proposal was then supplemented by one for a compromise, which agreed to recourse to the reservations in Article III of the Convention, i.e. that a contracting country should apply ULIS only to deals with merchants having their place of business in the territory of other *contracting* state.[23]

Accordingly, the application of ULIS became unconditional, and Article 2 categorically precluded the recourse to the rules of private international law once ULIS was applied.

Since at that time already a number of states undertook in conventions to establish the law governing international contracts of sales in conformity with uniform conflict rules,[24] and declined to withdraw from the conventions, as a compromise the path was opened to recourse to the reservation in Article IV of the Convention.

Hence the "uniformity" of the uniform law was undermined by giving possibility to recourse to the reservations in Articles II, III and IV, at the very outset. The acceding state could, in a manner departing from the wording of the Convention determine when it regarded the other state as "different", make the application of ULIS dependent on the provision of the conflict of laws, and narrow down the sphere of application by applying the uniform law only against another contracting country.

VII. Open gate to the non-acceding countries

(14) The recommendation of the Federal Republic of Germany met the demand for universality and would have advanced the spread of ULIS. Apart from the reservations it suffices to point out that ULIS is part and parcel of the municipal law of the judge and he can apply it even when the country of neither contracting party has ratified the Convention and even when besides the establishment of jurisdiction the country of the judge has nothing more to do with the deal.[25]

This is a novel "legal effect" in the law of international contracts. All that a country can do according to the dominant opinion is to apply a convention it has ratified to the other acceding country. A foreign convention cannot be forced upon a

[23] RIESE, O.: *Haager Abkommen* ... usw. Rabels, 1965, p. 10.

[24] See in particular the Hague Convention of the 15th June, 1955.

[25] Almost all authors call forth attention to the open gate of ULIS. (HONNOLD, op. cit., p. 333; EÖRSI, op. cit., p. 327; RIESE, op. cit., p. 11; TUNC, Commentary, p. 16; DÖLLE, Kommentar, p. XXXII, etc.).

non-acceding country, and if there are benefits stipulated in the convention, a non-signatory state cannot be granted a share in it. This difficulty can be eliminated according ULIS when the acceding country incorporates ULIS into its own legislation, or promulgates it as such (Article II of the Convention).[26]

(15) The misgiving that ULIS is applicable to merchants of countries which have not ratified the Convention does not concern the states that have ratified it. They have acceded to the Convention exactly because they want to apply it to themselves and also to others.[27]

If the merchants of the non-acceding countries are desirous to avoid the application of ULIS to their contracts, they have to avoid the court in an acceding country which at the ratification waived the reservation in Article III of the Convention, i.e. to apply the Convention only to another contracting country only.[28, 29]

Naturally this is not a safe method for the merchant of a non-signatory state to avoid the application of ULIS. The Federal Republic of Germany has ratified ULIS with the reservation provided in Article III: the German court will not apply ULIS to a case arisen between a German merchant and an alien whose country is not signatory to the Convention. Still in this case the law according to the German conflict rule will have to be applied. If according to the German conflict rule the law of a signatory governs the case which has not made use of the reservation in Article III, then the German court will, though by a roundabout way, nevertheless apply ULIS.[30]

[26] This is not without examples. The Geneva convention on bills of exchange of 1930 is at the same time the Hungarian Act on Bills of Exchange. If therefore a dispute under an international bill has to be determined according to Hungarian law, this will take place on the grounds of the Geneva conventions even when the bill has been signed by persons whose countries have not acceded to the convention. Still there is no special Hungarian law of bills, whereas ULIS lives parallel to municipal law.

[27] . . . these difficulties will be deposited on the doorsteps of non-adopting states. (HONNOLD: *The Uniform Law* etc. Law and Contemporary Problems Durham N. C. 1965, p. 334.)

[28] Belgium, Israel and Italy have not had recourse to this reservation. If, therefore, the parties can foresee that a lawsuit might be instituted against them in any of these countries by invoking Article 4 of ULIS they may exclude the application of the reservation. It is, of course, odd to exclude the application of a law that does not apply to the parties. On the other hand, if a party intending the institution of a lawsuit hopes to win the case on the grounds of ULIS, all he will have to do is to find grounds for the jurisdiction of any of the three states, and by this he will have subjected the case to ULIS. This is an occasion for forum shopping and an example for the uncertainty of law.

[29] The system of reservations provides facilities for the ratifying state only not to apply ULIS unconditionally, whereas no protection is afforded to the non-ratifying country. So e.g. the Dutch act introducing ULIS (15th December, 1971) states that ULIS has to be applied even when by either a foreign or a Dutch conflict rule Dutch law has to be applied. (DÖLLE: *Kommentar* p. 4). Hence this ratification also decrees the recourse to *renvoi:* the Dutch court may namely apply Dutch law on the ground of a foreign conflict rule when it has met the obligation of *renvoi*. The Dutch ratification may call into doubt the validity of the reservation based on Article III of the Convention of another acceding country. When country A has ratified with this reservation, whereas country B has not acceded to ULIS, then the Convention cannot be applied in country A in respect of a transaction in country B. Still when, for the one reason or the other, the lawsuit is instituted in the Netherlands and according to the Dutch conflict rule the law of country A has to be applied, the Dutch judge will apply ULIS.

[30] DÖLLE: *Kommentar*, p. 16. A few questions may still have to be answered. E.g. when in the acceding country ULIS is applied as foreign law, will it be bound to apply it in conformity with the foreign

(16) Hence ULIS will have to be applied:

(1) between two signatory countries;

(2) between a signatory and non-signatory when the forum is in the signatory country;

(3) between two non-signatories if the forum is in the territory of a signatory;

(4) if neither the country of the forum is a signatory, still in conformity with its conflicts law the law of a signatory has to be applied to the sales contract (?);

(5) if in conformity with Article IV the parties stipulate the application of ULIS (?).

Even in these cases ULIS cannot be applied

(1) between two countries if either of them has made use of the reservations in Articles II, IV or V;

(2) between a signatory and non-signatory state if the signatory state has made use of the reservation in Article III;

(3) if the contracting parties preclude the application of ULIS (Article 3 of ULIS).

This multifariousness of the conditions of the application calls into doubt the success of ULIS as a legislation bringing under regulation international sale with a uniform rule.

VIII. The solution of the UNCITRAL TEXT

(17) Much criticism has been brought forward against the provision of ULIS which precludes the preliminary settlement of a conflict among the conditions of the application of the uniform law.[31] There are opinions which want to know that this is the reason why the developing countries have declined to accede to ULIS. Also this may account for the demand on the part of UNCITRAL for the revision of ULIS. Still the concept again prevailed in the Conference of 1974, which discussed the wording of the Convention on Limitation.

The UNCITRAL TEXT, in its Article 1, defines the scope of application as follows: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

'(a) when the States are Contracting States; or

'(b) when the rules of private international law lead to the application of the law of a Contracting State."

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interpretation? Is there chance for legal remedy of the third instance (in case a violation of the law)? According to KROPHOLLER there is. (*Der Ausschluß des IPR im Einheitlichen Kaufgesetz*, Rabels, Jg. 1974, p. 378.)

[31] See KROPHOLLER, op. cit. p. 385. On the contrary CAMMERER: "... das Haager Kaufrecht ... soll dem Richter und den Parteien bei Kaufverträgen über die Grenzen hinweg die Unsicherheiten und Schwierigkeiten des IPR und der Anwendung fremden Rechts ersparen" (*Probleme* ... usw., p. 122.)

Hence the TEXT has taken over the subjective condition of ULIS: the places of business of the contracting parties are in two different states; application is precluded between enterprises operating in the same country. The nationals cannot avoid the rule of their municipal law, except it is agreed to by the permissive rules of municipal law.

Similarly, the TEXT has taken over the expedient that in the mutual relationship between two contracting states the Convention has to be applied unconditionally and it would be wrong if the application of the Convention would be made dependent on whether the conflict rule of the contracting countries or of either of them "approved" the application of the Convention. The approval of this expedient superseded the maintenance of the preservation in Article II of ULIS.

Hence for the TEXT it is sufficient for the application of the uniform law if the contracting parties have their places of business in two different countries ratifying the Convention. The objective condition is implied in the circumstance that the states of the contracting parties are signatories and not in the transaction of the parties. ULIS demands for the establishment of the presence of the subjective condition also that of any of the three objective conditions (see (11) *supra*): (1) delivery of goods beyond the frontier; (2) offer-acceptance across the frontier; (3) close of the deal and performance in two different countries.[32]

(18) Is the scope of application of the TEXT any wider than that of ULIS with the abandonment of these conditions? We hardly believe that this is the case. No doubt it is the common goal of both instruments to bring about the uniform regulation of the international sale of goods. Neither the Convention nor the TEXT defines in a positive form what a sales contract exactly is.[33] Nor do the three objective conditions of ULIS help us to a definition of the concept of a sales contract, still they define which contracts should be regarded as "international". ULIS uses a rule of extreme complexity to define this notion, which is perhaps the least contested question in international judicial practice. Since the following articles of both ULIS and the TEXT withdraw certain types of the sales contract from the ruling of the uniform law, therefore if there is incongruity between the spheres of application of the two instruments for this the articles creating exceptions account rather than the article 1 of the two.

Condition (a) of Article 1 will come into full operation only when the forum is also in the one or the other contracting country. In the court of a third, non-contracting country, the Convention cannot preclude the application of the conflicts law of the forum. The TEXT will not come into operation if a lawsuit is instituted in such a country and in conformity with the conflicts law of that country the law of the forum or of another non-contracting country will be applicable. This possibility,

[32] A/CONF/63/16–1975: paragr. 2 of Art. 3.: Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

[33] "Il a paru aux redacteurs ... que le concept 'vente' était suffisamment clair pour qu'il ne dût pas être défini dans l'acte international lui-même." RIGAUX E.: *Le contrat économique international*, Bruxelles, 1975. p. 70.

however, applies also to signatories of ULIS. It may occur, however, that in conformity with the law of the forum the law of the one or the other contracting party will be applicable. In this case the judge of the non-contracting country will decide the case in accordance with the TEXT. Still in this case he will be mindful of the rule that a foreign law has to be applied in the same way as the judge of the foreign country would apply it.

Hence condition (a) of Article 1 restricts the sphere of operation of the law to the contracting countries.

IX. The open gate of the UNCITRAL TEXT

(19) In conformity with paragraph (b) of Article 1 for the application of the TEXT it suffices that even if the contracting parties have no place of business in the contracting country under the conflict rule of the forum the law of a country has to be applied which has become signatory to the Convention. This will, of course, hold only when the subjective condition of Article 1 has also been met, i.e. the places of business of the parties to the contract are in different countries.

Here we are: the appetite of the TEXT is not much smaller than that of ULIS. It is applicable also in cases where neither the parties, nor the judge is in a contracting state, still in conformity with the conflict rule the law of a country has to be applied that has acceded to the Convention. Can the forum stem this appetite? Is it lawful that when the countries of the judge and of the two litigants are non-contracting countries, the case should be determined on the grounds of a convention the countries in question have never ratified? Or is it in agreement with the law that the judge applies the foreign law in the same way as the foreign judge? And what will be the situation when under the conflict rule of the signatory state to the Uncitral Convention it is not the law of that state that will prevail? This amounts to a case of *renvoi* still it may occur that the law of the forum precludes the *renvoi*. If in such a case the forum of the non-contracting country ignores the *renvoi*, then it would not determine the case as the judge of the foreign law would have determined it. On the other hand, if this forum takes into account the *renvoi*, then it would infringe its own law.

Paragraph (b) of Article 1 gave rise to protracted disputes and provoked a series of counter-proposals. There were delegates who would have the whole of paragraph (b) discarded. Still there were others who brought forward less ambitious suggestions according to which the uniform law would not be applicable unless the conflicts law of the one or the other contracting state decreed its application.[34]

The Diplomatic Conference in Vienna has solved the question with a compromise. Art. 95 of the TEXT permits a new reservation according to which:

[34] There were governments which thought it would be more appropriate to retain the additional requirements as laid down in ULIS (A/CN.9/125–p. 22.)

"Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention."

No need to say that differences in the scope of application of any "uniform" rule is the proper way leading to "forum shopping".

X. Limitations of application

(20) One of the barriers to the application of paragraphs (a) and (b) has been set up by section (2) of Article 1. Accordingly either contracting party has to acquire, in the one way or the other, knowledge of the fact that the place of business of the party contracting with him is in a foreign country. If an agent of the same country as the first contracting party closes the deal and fails to disclose his principal in the other country, no recourse can be had to the Convention when only after the making of the contract the foreign nationality of the principal will become known.[35] In other words, if there are no external signs which would inform the contracting party of the "international" character of the transaction, then the Convention must not be applied. At latest at the making of the contract parties will have to know that their contract comes within the sphere of the Convention. A restriction of this nature has not been taken up in ULIS.

(21) Both Conventions appropriately ignore the nationality of the contracting parties and whether the deal has been closed in the capacity of merchants or another capacity. (ULIS, section 3 of Article 1 and Article 7; section 3 of Article 1 of the TEXT.)

The by-pass of the nationality of the contracting parties has been brought under regulation in all earlier drafts of ULIS. Against a provision of identical meaning of the TEXT strictly speaking only a single government submitted a counterproposal. This government took the stand that the Convention should be applicable to sales contracts where the contracting parties are nationals of different countries and their places of business are also in different countries.[36] The committee rejected this suggestion. In international economic life nationality comes to be thrust to the background more and more. The process is accelerated by that the 'merchant' appears as natural person on rare occasions only. It is the enterprise that takes part in international economic relations. As for the juristic person (corporation) the country of the business activity is of importance.

The provision of the TEXT that for the purpose of the Convention it is immaterial whether the contracting parties or either of them are not merchants, is

[35] Yearbook, vol. VII. 1976. p. 97. The ICC approved the incorporation of the conflict rule. In their opinion, ULIS by the exclusion of the applicability of the rules of private international law in Art. 2 introduced complexities into the applicability of the Convention. It opened the gates to reservations and operated against universality as it detained many from ratification. (A/CN/9/126–p. 8.)

[36] Yearbook, vol. VIII. 1977. p. 26.

uniform with the respective provision of ULIS. Even in the Hague Conference only a single recommendation was submitted against this provision of ULIS[37], the same provision appeared in every earlier draft, and the conference approved of it.[38]

XI. Contracts exempted from under the Convention

(22) As has been seen ULIS does not define[39] the notion of an international sale. Article 1 merely defines which transactions should be regarded as international. Articles 5 and 6 of ULIS, however, seriatim enumerate certain types of contract which have to be exempted from under the operation ULIS. The TEXT follows the same method and enumerates the exemptions in its Articles 2 and 3.

This is not a defect of either ULIS or the TEXT. 'Mixed' contracts are also imaginable which are at the same time contracts for work, labour and materials and for sale, on which are of sale and donation, sale and barter commingled.[40] In practice, however, such contracts are of extremely rare occurrence to the extent that one million contracts will be performed in order before the nature of one would be questioned for want of definition. The 'international' character is that counts. This will determine whether the Convention or a municipal law applies to the contract, whether resorting to their autonomy the parties may stipulate the law which they intend to govern their legal relationship.[41] Even those who are not satisfied with the definition that the legal relation is tied up with more than one legal system *(Batiffol)*, or the presence of more than one state can be established recognize that this is an 'approximation grossière, suffisant peut-être pour l'usage courant du terme...' and that "qu'il n'existe pas de conception unique de ce qui peut leur conférer un caractère international".[42]

(23) According to Article 5 the provisions of ULIS cannot be applied to the sale of shares, stock, bonds, negotiable instruments, the sale of vessels registered or bound to registration, other water crafts or aircrafts, electrical power and to sales by auction decreed by the law. Sale by instalments has not been exempted from under the operation of ULIS, still the mandatory rules of municipal law serving the safeguard of the buyer's interest are applicable contrary to the provisions of ULIS (or the contract).

[37] A/CN.9./125–p. 41.

[38] RIESE, op. cit., Rabels Jg. 1965, p. 19

[39] EÖRSI agrees with ULIS that is has drawn no line between commercial and consumer's purchase. Still in want of an express provision he is of the opinion that ULIS, nevertheless, does not apply to consumer's purchases. He believes that by way of restrictive interpretation the application of ULIS may be excluded to such transactions. (EÖRSI, op. cit. p. 342)

[40] See note 20

[41] Under Common law the latter does not give birth to problems of delimitation.

[42] The French *Cour de Cassation* finds the international character in the fact that the goods cross the frontier, whereas its price passes the other way round. (Rev. Crit. de DIP. 1965. p. 348.) Else this is the principle criterion according to § 2 of the Czechoslovak law of foreign trade of the 18th December, 1963. The law of the German Democratic Republic of the 5th February, 1976 does not define the notion of international character for international economic contracts, still according to the commentary to the act a contract between two enterprises of the German Democratic Republic may for reasons of connectedness be regarded as international. MASKOW D.–WAGNER, H.: *Kommentar zum GIW*, Berlin, 1978, pp. 59 et seq.)

According to Article 6 the provisions of ULIS apply to goods to be manufactured in the future, except, however, if an essential and substantial part of the material necessary for manufacture is supplied by the customer.

Articles 2 and 3 of the TEXT depart in several respects from the provisions of ULIS stating the exceptions.

(24) Above all the TEXT exempts from the regulation what may be termed retail sales, i.e. the case when the customer buys the goods for personal or household use. This rule has been taken up for the more precise interpretation of the provision of paragraph (3) of Article 1, *viz.* that for the purpose of the application of the Convention it is immaterial whether either of the parties is a merchant or not. The provision itself is indispensable and not merely useful. Sales for consumption are in a number of countries governed by special rules which safeguard the interests of the buyer, i.e. rules of a mandatory nature. Here recourse would be had to the special law against the rules of the Convention. A large portion of such consumer sales come in any case within the purview of the municipal law of the place of sale, although cases are not unlikely when in response to the catalogues distributed by the great department stores the world over orders are incoming from, and deliveries of goods are made to, abroad. If in this case until the deal has been closed the seller has no information of the destination of the goods for domestic or personal use, the contract will come within the sphere of the Convention.

(25) Sub-paragraph (b) exempts sales by auction from under the operation of the Convention. The reason for making this exception was that in most countries sales by auction had been brought under regulation by special legislation and that it appeared to be convenient not to exempt such sales from under the ruling of such legislation. The reason given for this exemption is not quite conclusive and the present author sees no reason why sales by auction should be withdrawn from the sphere of application of the Convention. Auctions of this kind are mostly organized by institutions (exchanges, market organizations) which proceed in conformity with their own usages and not under national law. And for that matter usages have priority before the TEXT (Article 9). The goods submitted to auction are the property of the merchant and not of the auctioneer. The alien buyer is in like way a merchant. The auction itself merely serves to have an important element of sales, *viz.* the price established in public. For the rest it is an international sale with the same rights and obligations as any other contract coming within the purview of the TEXT. There is no reason whatever why the Convention should not be applicable to a sales contract come into being in this manner. On the other hand, the exemption specified in sub-paragraph (c) relies on solid foundations. Sales on execution or by authority of law are expressly relying on statute. A sale of this kind is one of the cases of forced sales, which cannot be exempted from under the operation of the law by which recourse had been to forced sale.[43,44]

[43] FONTAINE, M.: *Le contract économique international*, Brussels, 1975, pp. 22, 23

[44] On the other hand, it is true that this is not even a sales contract; the seller is not owner but the official agency of the state. The conditions of sale are not defined by the owner as in the event of an auction, but the law. Nor do the rules of warranty prevail.

(26) Sub-paragraph (e) exempts vessels, water crafts and aircrafts completely from under the operation of the TEXT irrespective of whether these have been registered or are not even bound to registration. This definition is fairly vague in particular when a wording other than English has been accepted for ratification. In the English language namely the terms "ship" and "vessel" are used to denote water craft of larger dimensions. The question is, how other languages are capable of expressing the shades and hues distinguishing the one term from the other. This may explain the large number of counter-proposals brought forward against this otherwise laudably concise formulation. It has been considered necessary to restrict the rule to craft which at the time of sale have already been registered. Such vessels or ships can be sold namely only in conformity with the rules of the port of registration and the special standard conditions. Any other vessel irrespective of whether or not bound to registration comes within the scope of operation of the uniform law of sales. According to other recommendations the relevant provisions should be restricted to vessels in excess of the gross tons.[45]

I believe we can agree with those who do not want to discover special features in contracts for the sale or the construction of ships which would distinguish them from all other international sales. Hungarian shipyards build sea-going vessels of medium size, still the machine factories of Hungary are capable of supplying large manufacturing plants, oxygen factories, aluminium processing plants, etc. Why should the sale of a ship be governed by provisions other than that of an aluminium processing plant? The exemption of registered vessels may have its reasons, still since their sale takes place on standard conditions (which have priority before the Convention), no special complexities would arise had water and aircraft been omitted from among the exceptions, or in other words, if the sales contracts covering these had been allowed to remain within the sphere of operation of the uniform law. This does not mean that I consider it absolutely necessary that the contract for sale of a ship or vessel had to be governed by the uniform law, the less that this is possible. For this, i.e. the extension of the operation of the uniform law to the sale of ships, a traditional attitude would have to change which treats ships under the same heading as realty or real estate. (It does not consider ships "*objets mobiliers.*")[46] The sale of small sailboats, or other vessels not bound to registration, may, provided the contract serves commercial ends and not personal use, drawn with the help of interpretation within the sphere of operation of the Convention. This end is served by the recommendations of the Mexican government, which sets out from the understanding that the rules of registration of

[45] A/CN.9./125–p. 25, 41. According to RIGAUX the term "ou à enregistrer" is in contradiction to article 2. ". . . la référence à une règle de conflit de lois est ici implicite . . . Comment savoir si un navire. . . est enregistré et surtout s'il doivent l'être, sinon par référence à la loi national compétente"? op. cit. p. 84.

[46] Quoiques meubles par nature, les navires et les avions ont une condition à part, qui tient à l'existence d'une attache fix, permettant notemment de les soumettre à un régime de publicité analogue à celui des immeubles. Le raisonnement qui conduit à appliquer la *lex rei sitae* aux immeubles incite donc à les soumettre à la loi du pavillon. LOUSSOUARN–BREDIN: *Droit du Commerce International*, Paris, 1969, p. 654

larger vessels depart from those of the registration of smaller craft for personal use. The latter come within the purview of the rules of local or municipal registration, the registration of the latter is of a national character. By virtue of this discrimination then the Mexican delegate proposed the exemption of smaller vessels from under the operation of the Convention.[47]

(27) Sub-paragraph (b) exempts electricity, too, from under the operation of the Convention. Recommendations have been brought forward also for the cancellation of this provision giving as reason that 'electricity would not be regarded as goods'.[48]

This recommendation is proper, still for the likely variants in the translation of the uniform law it appears that the exemption of electricity is well founded.[49]

(28) Sales of livestock have not been exempted from under the operation of the TEXT, and the transactions enumerated in sub-paragraph (d) do not include documentary sales, i.e. sales of goods by way of instruments representing the goods.[50] This interpretation may, however, come into conflict with the interpretations current in certain legal systems which qualify transactions of this kind as sales of securities. Still it should have been made clear that the relevant provisions of the TEXT are construed so as to extend the force of the uniform law to such transactions.

XII. Delimitation of contracts others than such for sales

(29) Article 6 of ULIS regards contracts for goods to be manufactured in the future also as coming within its sphere, except, however, the case when the customer undertakes the supply an essential part of the materials necessary for production. This provision is in agreement with paragraph (1) of Article 3 of the TEXT. Still there is yet another rule incorporated in paragraph (2) of the same article, namely that "This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services".[51]

Apparently, Article 6 of ULIS and Article 3 of the TEXT are congruous. Still it seems as if the TEXT is more concise. It abandoned the sphere of delivery of goods and (if not with this designation) exempted the contracts for work, labour and materials from under the operation of the Convention.

Recommendations have been brought forward to delete Article 3 of the TEXT. Those recommending the cancellation of this article argue that since here we have not

[47] Yearbook, vol. VI, 1975, p. 74

[48] A/CN.9./.25–p. 12.

[49] A comparison with the French and English wording will suffice: the English text uses the term 'goods' to express all that the French text calls *'objets mobiliers corporels'*. The latter defines the object of the TEXT *verbatim* one may say it is a *precise definition*. If the term 'goods' is used in this meaning, this is *qualification*, something experience teaches us to avoid.

[50] Yearbook, vol. VII, 1976, p. 98

[51] It is in agreement with Art. 6 of the text of Limitation

the case of a sales contract there is no reason to fear that even in want of a provision the court would apply the Convention to a transaction as specified in Article 3. Undoubtedly this is correct. Still it is worth considering that no clear-cut line can be drawn between a sale and a contract for work, labour and materials.[52] As guidance for such marginal cases we may perhaps accept the ratio of the material provided by the customer and the productive work he has ordered. This may be of particular significance in the case of contracts for the machinery of such turnkey plants where the seller undertakes installation work of equipment as well.

(30) Naturally neither ULIS nor the TEXT settle all problems by the delimitation of contracts for work, labour and materials. It is not clear e.g. whether the leasing-contract, which guarantees to the leaseholder an option for the purchase of the object of lease, comes within the domain of the Convention. There are legal systems which do not consider leasing-contracts without option as leasing. According to others an option clause qualifies the leasing contract as sales contract. According to *Dölle*'s Kommentar the hire-purchase contract and in general the contracts where at the expiry of the lease the leaseholder acquires the ownership of the leasehold *(Mietkaufverträge)* come under the heading of sales contracts.[53]

Against the article of the TEXT stating the exceptions by far more amendments were moved than against Articles 2 and 3 of ULIS.

Recommendations have been brought forward for taking up a number of specific sales contracts among the exceptions. Such are the hire-purchase contracts, the purchase of goods to be acquired subsequently, sales on return, part exchange contracts, sales of emblements, etc.[54,55]

While the formulation of the TEXT was in progress only a single amendment was moved, namely the exemption of the sales of natural gas, like electricity, from under the operation of the Convention. The commission rejected the motion. Unlike electricity gas was declared to be a corporeal movable which can be purchased also in a liquid or solid state and not only in a gaseous state. Instead of a lengthy regulation of marginal cases it has been left to the contracting parties to specify in their contracts whether or not the Convention should be applied.

Both ULIS and the TEXT agree that in conformity with the principal rule defining the legal form of exemptions the sales contract should as a rule be regarded as coming within the purview of the Convention. The party desirous to avoid the application of the Convention has to produce evidence to the effect that the concrete contract is exempted from under the Convention.

No rule in agreement with paragraph (2) Article 5 of ULIS has been taken up in the TEXT. This rule states that ULIS does not affect the municipal mandatory

[52]Even for GAIUS it was a problem to keep *emptio-venditio* and *locatio-conductio operis* apart. (*Institutiones*, lib. III 147)

[53] Op. cit. pp. 9, 28

[54] RIESE: op. cit., p. 19; EÖRSI: op. cit. p. 342

[55] Yearbook, vol. VIII, p. 27

provisions applying to sales by payment of the price by instalments. These rules safeguard the interests of the buyer or consumer, and since in conformity with paragraph (a) of Article 2 sales of this kind do not come within the purview of the Convention, the rule has become superfluous.

XIII. The autonomy of the contracting parties

(31) In the sphere of international economic contracts the parties enjoy autonomy by far in excess they would enjoy under their respective municipal law. This is the case notwithstanding the circumstance that legislation (and here actually the case of the socialist countries may be handled together with that of the capitalist world) in a number of spheres controls and by this restricts the autonomy relying on the principle of *laissez-faire*. This is what *Steindorff* calls "the steering function of private law".[56]

Notwithstanding state 'interference' the autonomy of the parties is even today an important precondition of the development of international economic relations. The unrestricted recognition of the choice of law is making headway more and more. By the application of the chosen law the parties may avoid the application of the mandatory rules of the law to be applied in want of a choice of law. They may submit their dispute to arbitration and define the rules of procedure of the court of arbitration. Moreover the parties may decree that the arbitrators pronounce their award and determine the case *ex aequo et bono* by disregarding any concrete legal order.

Both ULIS and the TEXT do not affect the freedom of the contracting parties.[57] According to Article 3 of ULIS:

'The parties to a contract of sale shall be free to exclude the application thereto of the present law either entirely or partially. Such exclusion may be express or implied.'

According to Article 6 of the TEXT:

'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.'

From a comparison of the two wordings it is apparent that unlike ULIS by the last sentence of Article 3 the TEXT does not provide how the parties may exclude the application of the Convention.

Paragraph 3 of Article 3 of the Limitation Convention provides that 'This Convention shall not apply when the parties have expressly excluded its application'.

An amendment has been moved for Article 6 of the TEXT according to which the words 'by express stipulation' should be added.[58]

[56] STEINDORFF, E.: *Autonomy of Contracting Parties in Interstate Commerce*, Oceana Publications, 1977, vol. I, p. 93

[57] Man wird als eine die Loi uniforme leitenden Grundgedanken den Satz ansehen dürfen, daß ein richterlicher Eingriff in die Vertragsbeziehungen der Parteien nur dort zulässig ist, wo das Gesetz ihn vorsieht. DÖLLE: *Kommentar*, p. XXXIII

[58] A/CN.9./126–p. 11

According to the official motivation of the Uncitral draft the parties may exclude the application of the Convention 'by choosing a law other than this Convention...'. By virtue of the amendment moved before the application of the Convention may be excluded by express stipulation. According to the motivation this wording is still inadequate. The other law should be chosen *expressis verbis*, as this excludes the application of the Convention. The terseness of the formulation has already raised issues of interpretation. In any case it is welcome that the TEXT has not taken over 'implied' exclusion.[59]

(32) ULIS has thrown open yet another gate to the autonomy of the parties by Article 4. This Article authorizes the parties to stipulate the application of ULIS even when the subjective and objective conditions enumerated in Article 1 are not present. It adds, however, '... it does not affect the application of any mandatory provision of law which would have been applicable if the parties had not chosen the Uniform Law'.

A similar provision has been taken up in Article 4 of an earlier formulation of the Uncitral draft: 'This Convention also applies where it has been chosen as the law of the contract by the parties.' The motivation believes the provision to be of use because on its score a businessman of a contracting country may for his transaction with a businessman of a non-contracting country stipulate the application of the Convention. Still it may be of use also for the businessmen of non-contracting countries if the legislation of their country has failed to call into life 'a modern law of sales applicable to international contracts...'[60] Finally, the stipulation may be of use in the event of a local contract associated with an international transaction. This is a recognition of the fact that Article 4 of the draft skirts on the boundaries of the autonomy of the parties.

Although the provision does not incorporate the same closing sentence as Article 4 of ULIS, still for the makers of the TEXT it was not doubtful that the stipulation of the parties had the same limitation as the one included in ULIS. An opponent of the article correctly argued that 'Even if article 4 of ULIS did not exist, contracting parties still could agree on the application of the law of a given country or of any convention, and such application would be valid within the limits of optional law as opposed to mandatory law...'[61] Hence the admissibility of this stipulation does not follow from Article 4 of ULIS. It has its roots in the autonomy of the parties. Consequently, the last Uncitral draft has omitted this provision, still by this it has not prevented the parties in agreeing on the application of the Convention in their contract within the above limits.

(33) Does the Convention extend its sphere of operation when the parties within the limitations of the previous section consider it the Convention normative for their contract? A reply will again be obtained by way of the notion of autonomy.

[59] For the restrictive interpretation of Article 3 of ULIS see the judgements analysed in notes 14 and 15

[60] Yearbook, vol. VII,1976, p. 99

[61] A/CN.9./c.1/SR. 8 para. 10

Strictly speaking we are inaccurate when in the domain of the conflict of laws we classify the right of choice of the law by the parties according as the parties (a) may choose whatever law without limitation, (b) may choose the law within the limitations defined by the law; and (c) cannot for certain contracts or in certain cases choose the law. The courts in general disregard the law chosen in contradiction to cases (b) and (c), and apply the law of the legal system specified by their own conflicts law. This is not a reassuring expedient: the limitation of the autonomy is not equal to the withdrawal of autonomy. In the event of a transgression of the limitation we have to ascertain the legal effect of the choice of law. If the law chosen cannot be applied as a law then it stands to reason that the contract of the parties is subject to the law applicable in the absence of choice. Still it cannot be doubted that the parties wanted the provisions of the other legal system to be applied to their contract. Therefore, the provisions of the law chosen must be regarded at least as part and parcel or the extension of their contract. This means that in the absence of a choice only the mandatory rules of the legal system to be applied are applicable to the contract, whereas within its permissive rules the provisions of the law chosen by the parties will be valid.

This is the conclusion which for that matter may be drawn from the correctly formulated thesis of *Dölle*'s Kommentar (see note (57)).

(34) In connexion with Article 4 of ULIS yet another question emerges. Namely the right of the parties to choose the law to be applied to their contract cannot be but the law of one or the other specified country. This law can be only one which is part of the municipal law of a given country. This may be a municipal enactment or a ratified and incorporated convention. No rule can be applied as law unless it is backed by a state. A dispute under a bill of exchange may be determined by the Hungarian Act of Bills. This means that the Geneva Convention on Bills will be applied. Still the Convention itself cannot be stipulated as law without the indication of a country, the less when in the course of its circulation the bill does not turn up at all in a country which has ratified the Geneva Convention. The judge cannot apply it because the Geneva Convention on Bills in itself is a series of abstract rules, to which no recourse can be had in conformity with any conflicts rule. The freedom of the parties to choose the law does not extend to the choice of a regulation abstracted from all states and legal systems.[62] Actually, in our days this is the technique of private international law which with the spread of uniform legislation might undergo changes.

What happens if the parties stipulate the application of ULIS, although they are nationals of non-contracting countries? If the judge's country is a signatory to ULIS he will apply it as the law of the forum. Still if this condition is not met ULIS cannot be applied as law. If the parties stipulate ULIS as an international convention valid somewhere in the world, then it is merely an extension of their contract and not law to

[62] Here the question already comes into contact with the problem of the *contrat sans loi*, which we shall not discuss at this place. (Cf. *Le contrat économique international*, Brussels, 1975, p. 461; Eörsi: op. cit., p. 333.)

which the contract of the parties is subject. If ULIS has been stipulated as the law of the one or the other acceding country, then the judge will determine on the ground of his own conflict law to what extent he may accept the stipulation as valid.

Hence on the ground of Article 4 ULIS comes to be degraded to a contract. In this case its erroneous application or interpretation is not infringement of law. On this count no remedial action is admitted. The provision of ULIS will not hold when they conflict the mandatory rules of a law, etc.

(35) On the grounds of ULIS there is, however, a chance for applying the uniform law as law even when the country of the one contracting party, or only the country of the forum have become signatories to ULIS. This is the case when the signatory country has had no recourse to the reservation guaranteed in Article III of the Convention, i.e. the application does not depend on the status of the other country of a Contracting State. The TEXT does not recognize this facility. According to paragraph (a) of Article 1 the Convention comes into operation automatically when both states are contracting states. In conformity with paragraph (b) the uniform law may be applied even if neither state is signatory to the Convention, still in this case application will depend on the law of the forum, or possibly on the position the judge takes. If the forum is not a signatory, the judge is not bound to apply the Convention: he may have recourse to the municipal law of the country. On the other hand, if the business place of either contracting party is in a signatory state, then in agreement with the other contracting party the uniform law may be stipulated. Any forum will respect a stipulation in this sense.

(36) A comparison of the sphere of application ULIS and the TEXT have brought under regulation impresses as if for its simplicity and lucidity the regulation of the TEXT had provided better chance for broader acceptance of the convention. While as compared to ULIS the TEXT narrows down the sphere of application of the Convention, as regards the definition of the subject-matter of the regulation considerably extends this sphere. It will suffice to point out that the contract will become "international" even when the places of business of the two contracting parties are in different states. Not a single of the three objective conditions of ULIS have to be met to this end. On the other hand, the TEXT expressly excludes contracts of a personal or household character, for else tourists going to a foreign country would for almost all their purchases come under the operation of the uniform law. (Under ULIS this would be the case only when seller forwards the goods to the address of the alien buyer.)

The provision of paragraph (b) of Article 1, that the uniform law is applicable also when in conformity with conflicts law the law of a state is applicable which has not become signatory to the Convention, in reality implies the contingency that the Convention will be applied even when neither the countries of the parties nor that of the forum is a signatory (see ch. 19.). We have to add, however, that this 'open gate' does not threaten the non-signatories with absorption. The Hague Convention of June 15th, 1955 and so also the convention of the socialist countries unanimously decree the

application of the seller's law to sale contracts. This connecting factor is making headway more and more. Hence the TEXT merely provides a facility for the application of the uniform law to non-signatories, still in practice the occurrence of such cases is negligible: in practice the state of the one of the parties will be a signatory to the Convention.[63]

XIV. Usages and practices

(37) In section (10) we have made clear that the uniform law is the last link in a hierarchical chain and recourse to it will be had only when from the sources preceding it the mutual rights and obligations of the parties cannot be established. Of these preceding sources the usages have given rise to most disputes, partly because with the signature of their contract the parties will find themselves under the ruling of the usages even without their express will, partly because both ULIS and the TEXT have brought under regulation the application of the usages. The application of the uniform law begins where that of the usages ends in a sense that they do not provide for the dispute to be decided. Hence the usages have a dual role: first, they narrow down the sphere of application of the law, secondly, by supplementing the contract facilitate the interpretation of the contract and of the law.

The literature defends divergent positions taken in theory as to the origin, purpose and application of the usages.[64] The scope of the present paper does not allow of the taking of a position in the matter, therefore we merely call forth attention to the circumstance that as for their function the usages occasionally rise to the level of a provision of law. On other occasions they may supplement the contract, on yet others they serve the interpretation of the contract. Theoretically, it has not been settled what makes the usages binding on the parties. Does their application rely on statute or the contract? This uncertainty may perhaps explain the great variety of names given to the institution.[65,66] There are civil codes which expressly provide for the application and function of the usages.[67] Here the source of application can be established. Even this does not answer the questions of which of the several usages should be applied, whether an internationally approved usage has become international by setting out from the national soil, or do usages originate on the level of international traffic.[68]

[63] In this case the forum is the ordinary court of law; the tribunal of arbitration will give its award in conformity with the law the parties have chosen.

[64] EÖRSI, GY.: *Elkészült az UNCITRAL Egységes Vételi Tervezete* (The draft of UNCITRAL's uniform law of sales has been completed). Külkereskedelem, ... p. 146.

[65] DÖLLE: *Kommentar*, pp. 41–42; BONELL, M. J.: *The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts* (Acts and Proceedings of the 2nd Congress of Private Law, Oceana Publ. 1977); JAKUBOVSKY: *New Directions* ... etc. p. 550

[66] Usages normatifs, usages interprétatifs, usages conventionels, model-definitions, causal law, etc.

[67] Articles 1340 and 1368 of the Italian civil code; Article 1856 of the Mexican civil code, etc.

[68] ... certains usages sont assez généraux, et, dans la pratique, assez constamment adoptés pour que l'on puisse hésiter entre la qualification légale ou contractuelle. (LOUSSOUARN–BRÉDIN, op. cit., p. 656.)

(38) Article 9 of ULIS and Aricle 9 of the TEXT incorporate provisions on the binding force of the usages. The two provisions differ from each other. According to ULIS the scope of application of the usages is wider than that of the TEXT. And since the application of the convention begins where that of the usages ends, under the TEXT the uniform law has better chances of application.

ULIS contains three provisions governing the application of the usages:

(i) the parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract ...

(ii) the parties are bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract ...

(iii) in case of conflict with the law the usages shall prevail unless otherwise agreed by the parties.

Hence the application of the usages may be stipulated: their application may follow from the contract, and, finally, from the fact that the usages are normally and usually applied by reasonable persons in the same situation as the parties. Consequently, it is not necessary that the parties should be acquainted with the usages or should have knowledge of their existence at all.[69] To this we have to add that commercial or professional usages develop in the countries with developed economies. For the mind of a reasonable person always the mind of a merchant of a developed capitalist country should be understood. Therefore this rule is apt to produce inequitable results in particular for enterprises in developing countries.[70] ULIS does not distinguish between international and national usages, i.e. there is scope for the application of both and in practice this rule prevails.[71] There are opinions according to which such a distinction would be meaningless, moreover even dangerous for the obstacles it puts up to application.[72]

The Hague conference approved the rule notwithstanding the many objections. Moreover, there was a moment when it appeared as if the passage on usages not known to the parties would be dropped.[73] Nevertheless the conference passed the provision

[69] The application of the law of which the parties are ignorant is not analogous with this. First, the knowledge of the law after promulgation is a *praesumptio iuris et de iure*, secondly, the presumed knowledge of the law is one of the sources of the freedom of the choice of law. Finally, as regards the content of the law the parties have access to professional information. The same cannot be said of the usages of the existence of which either party or both may have no knowledge.

[70] KATONA, P.: The extent of an area where a usage prevails is frequently uncertain, diverse usages may evolve in one and the same area in respect of one and the same commodity. *Unification of the Law of International Sales* (Legal Problems in International Trade, vol. II, pp. 163–192, Budapest, 1959.)

[71] EÖRSI: *The UNCITRAL Draft* ... etc. p. 146

[72] ... auf das Rechtsverhältnis der Parteien ist das Haager Kaufrechtsübereinkommen vom 1. Juli 1964 anzuwenden ... Dies wiederum entspricht naturgemäß dem *Ortsgebrauch* im *Obst*handel ... (italics by author). Landgericht Duisburg, 16. Juli 1976. (Unidroit Revue, 1977, vol. II, p. 284.)

[73] JOKELA, H.: *Scandinavian Studies in Law*, 1966, p. 95

with the addition that the parties were bound by the practice which became established between them.[74]

The provision in (iii) that in the event of a conflict between law and usage the usage should prevail follows from the permissive nature of the law and the priority of the usage.

(39) Article 9 of the TEXT has narrowed down the sphere of the application of usages substantially. By this it has widened the sphere of application of the TEXT. It has decidedly rejected the application of local usages "by surprise." At the same time, it tied the implied application of usages to different conditions.

The TEXT has in principle accepted paragraph 1 of Article 9 of ULIS. The first rule of the applicability of usages is the agreement of the parties. This agreement is not, of course, limited to international usages: the parties are free to agree on the application of any local or specific usages. Without any agreement the parties are bound by any practices established between them.

Without an express agreement the application of usages based on implied agreement depends on the simultaneous existence of two conditions. The one is that only usages can be applied of which the parties knew or have reason to know. Secondly, usages can be applied only which are widely known in *international* trade and regularly observed by parties to contracts of the type current in the particular trade concerned.

According to the commentary this last half-sentence exactly defines the usages the parties "had reason to know," nevertheless it is not quite clear whether such usages will in any case have an international character. Paragraph 4 of Article 38 of ULIS provides for the application of local usages. The corresponding Article 38 of the TEXT does not mention the applicability of usages, the commentary to the Uncitral draft reads as follows:

> 'Because of the international nature of the transaction the determination of the type and scope of examination required should be made in the light of international usages.'[75]

It is hard to imagine that for the examination of goods supplied to buyer 'international' usages should have come to be established. This is possible for goods which are traded and sold on the exchange (grain, wool, cotton, metals, etc.) where the quality standards have been defined and are controlled in conformity with exchange usages. In the majority of sales contracts, however, the method of control is tied to the locality and may not only be of as many kinds as goods or commodities may be objects of the transaction, but depends on the package, quantity and many other circumstances. Unless the parties have agreed on the method of control, the application of *local* usages can hardly be avoided.

[74] DÖLLE: *Kommentar*, pp. 39, 40; RIESE: op. cit., II. Kapitel. Riese mentions that the cancellation was moved by the Bulgarian and Hungarian delegations on the plea that a provision of this kind would put obstacles in the way of the unification of law.

[75] Yearbook, vol. VII, 1976, p. 109

(40) The contrary opinions brought forward against the provision of the TEXT on usages objected, on one hand, the priority of the usages and the frequency of their application, while others, on the other hand, objected the narrowing down of the wide sphere of application ULIS grants to usages. Already in the preliminary stage of the formulation of the Uncitral draft it was suggested that "when redrafting the text of article 9 of ULIS it was proposed that after the word 'usages' be included 'even if of local origin'".[76] Recommendations have been forwarded suggesting that the usages should be applicable even when a newcomer in the trade is not acquainted with them. He cannot, therefore, plead ignorance. Recourse may be had even to local usages 'in the case where they are internationally known.'[77]

Others have drawn the conclusion from the actual text 'that usages will be most frequently applied, thus derogating from the provisions of the Convention...' and this is unwelcome also because the usages have been developed by groups economically strong having a power position in the world market.[78] This, far-seeing argumentation cannot, however, be resolved with means the law lends, or only in a very limited measure. Law cannot defeat economic power, and, in particular, not a law which is optional for the parties, i.e. where their contract can even exclude its application. And coercive rules cannot be resorted to for the unification of the law of international trade. Nor will such rules help this uniform law to spread.

(41) The departure of the provisions on the application of the usages of the TEXT from those of ULIS is even more accentuated than the difference in the field of application of the Convention itself. On the formulation of Article 9 of the TEXT not only legal considerations prevailed. Also politics had a word to say. Already at the Hague it was suggested that Article 9 of ULIS might become an obstacle to the ratification of the Convention by the developing countries. It may be presumed that Article 9 of the TEXT has removed these obstacles.

The legal significance of the TEXT consists in that that with the narrowing down of the sphere of application of the usages the sphere of application of the uniform law has expanded. Wherever usage has come to be thrust out the contract of the parties may enter, and in want of a contract the law will become the ruling factor. It appears, therefore, as if the concept of the TEXT had brought us closer to the goal of the unification of law.

XV. Interpretation

(42) The provisions of both ULIS and the TEXT bringing under regulation the method of interpretation are those which have elicited the keenest disputes. Already the Hague Conference rejected the motion that the judge should be vested with powers

[76] Yearbook, vol. I, p. 134
[77] A/CN.9./1925–p. 65
[78] A/CN.9./195–p. 59

very much the same as laid down in Article 1 of the Swiss *Zivilgesetzbuch.*[79] The outcome of the debate is, nevertheless, a wording coming close to what the Swiss civil code formulates as '... soll der Richter ... nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde.'

From a collation of the relevant provisions of ULIS and the TEXT it is evident that for the application of the uniform law the TEXT turns to conflicts law (unlike Article 3 of ULIS). Similarly, the last rule of interpretation is the recourse to the private international law unlike ULIS. In other words both instruments agree on that interpretation has, at first, to rely on the uniform law itself and on the principles derived from it, but the TEXT fills up the gap by recourse to conflict rules.

(43) ULIS sets up two rules of interpretation. The first relates to the interpretation of the contract of the parties. Paragraph 3 of Article 9 provides that 'Where expressions, provisions of forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned'.

For the interpretation of ULIS itself Article 17 provides as follows:

'Questions concerning matters governed by the present law which are not expressly settled therein shall be settled in conformity with the general principles on which the present law is based.'

If we now interpret this rule of interpretation it will be evident immediately that it provides guidance for the closing of possible gaps, i.e. for the solution of questions for which ULIS does not provide rather than for the interpretation of the written text of ULIS.

Hence ULIS provides only for one half of the interpretation, i.e. for how to fill the gaps of law, whereas it fails to bring under regulation the method of interpreting the text itself. This is consistent with the principle set forth in Article 2, whereas all proposals moved to the effect that for cases not regulated by this law the law applicable according to conflicts rule should be taken into consideration, have been rejected. This expedient met in particular with the opposition of the Federal Republic of Germany, because an additional nest of litigation would be brought about in respect of the question whether there is a gap in law.[80] Professor *Tunc* believes the solution to be satisfactory for two reasons. First, 'the law is very detailed so that true omission will doubtless only be rarely found in it', and, secondly, 'because it contains a large number of provisions it will ordinarily be easy to extract its general principles.'[81] This solution of ULIS is the source of many doubts. It does not exclude the possibility of a gap of law, still it does not authorize a solution by invoking another provision of law, in other words, by *analogia legis*. Such a *lex* would normally be national or municipal law. Instead the rule closing the gap has to be derived from ULIS itself, which is but the

[79] DÖLLE: *Kommentar*, p. 124
[80] EÖRSI: op. cit. p. 333
[81] *Commentary*, p. 44

adoption of Article 1 of the Swiss civil code: the judge turns law-giver. Although in the debate preceding the formulation of ULIS it was sounded that 'es ist nicht Sache des Richters, wie ein nationaler oder internationaler Gesetzgeber aufzutreten,'[82] Article 17 nevertheless grants this privilege to the judge.

(44) Despite the possibility of recourse to analogy the filling of the gap is, nevertheless, inevitably legislative activity. 'Im Ergebnis läuft dies zwar auf eine Gesetzgebung ähnliche Funktion', writes *Dölle,* when, at the same time, he expresses his anxiety that there will be few judges who could free themselves of their training in national law and come to conclusions on the ground of principles accepted specifically in international commercial life.[83] The law may exclude the application of conflicts law, still the law whose knowledge qualifies the judge as judge cannot be excluded from the judgement. This is not a pleading for conflicts law, only an analysis to establish to what extent the solution replacing conflicts law has brought us closer to the goal of ULIS, i.e. uniform law. Recourse to conflicts law has its risks: there are as many laws as there are countries, and as many interpretations and ways to fill gaps of law. And there is perhaps no less truth in stating that there are as many laws as there are judges.

(45) Article 17 of ULIS is not without examples. Similar rules of interpretation and filling gaps of law have been taken up in Article 38 of the Statutes of the International Court of Justice, in other international instruments and in the legislation of a number of countries for the interpretation of treaties and conventions. These have a common trait, however, *viz.* they provide rules for interpretation for a single forum only, which may be an international forum or perhaps the supreme court of the one or the other country. The Rome Treaty laying the foundations of the European Economic Community organized a special court for the application and interpretation of the Treaty (Articles 164 and 177). The organization of such a special court cannot be hoped for in the event of a convention whose goal is the creation of the uniform law of states of different economic systems and degree of development. Not all of the signatory states would accept a uniform interpretation originating from some sort of an international forum, at least not in the present phase of the development of world economics. Professor *Tunc* himself does not seem to indulge in his optimism for he expresses his hope 'that an international body of case law will be formed, and that it will carry *de facto* authority, even in the absence of supra-national jurisdiction.'[84]

(46) Article 7 of the Uncitral TEXT formulated the rule of interpretation as follows:

'In the interpretation and application of the provisions of this Convention regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.' This formulation did not take into account possible gaps of law. Implicitly it pronounced that any question may be solved on the ground of the interpretation of the provisions of the draft, when it is

[82] DÖLLE: *Kommentar,* p. 124
[83] *Kommentar* pp. 139, 140
[84] *Commentary,* p. 44

agreed that even before recourse to the relevant provisions of law the contract of the parties, the practices established in the course of business relations or the usages give a solution into the hands of the judge. The draft did not seem to reckon with the contingency that after or even besides the interpretation of the existing rules further tasks may confront the judge. The makers of the draft did not seem to fear what Bacon brought up against the Church of Rome: '... pretextu interpretationis Scripturarum, etiam addit aliquid quandoque et immutat."

Article 13 of the draft preceding the above rule of the final draft brought under regulation the method of interpretation in agreement with Article 7 of the Limitation Convention. The passage 'and the observance' has been added by the last conference to the rule.

The Diplomatic Conference in Vienna by establishing the TEXT has finally accepted the possibility that neither the text itself nor its general principles could give an answer to every question that may arise in the field of international sale. It accepted an additional provision for this case by accepting recourse to conflict rules. Para (2) of Article 7 reads as follows:

'Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

ULIS, the Limitation Convention and the Uncitral draft agreed that the law according to the conflicts law cannot advance the cause of interpretation. This precludes recourse to both the *analogia legis* and *analogia iuris*. So far there is no legal order of international validity or a convention bringing under regulation related scopes which by the means of analogy would provide facilities for the appropriate interpretation. It is the condition of analogy that there be another regulation relating to an allied scope, the one or the other concrete provision of which may replace the missing rule *(analogia legis)*, or from the other law principles may be derived which provide a solution for the cases not provided for by the law *(analogia iuris)*. For this purpose municipal law or the legal system of a country cannot come into consideration. Hence those in charge of the application of law cannot come to a solution unless by transgressing the boundaries set by the traditional methods of interpretation and *creating a new law*. We are inclined to believe that a fear of this contingency may account for the repeated moving of recommendations which wanted to extend the methods available for interpretation by means of the conflict rule.

(47) The many motions which wanted to obtain an amendment of the article seem to have feared the uniformity of interpretation. Above all, they wanted to have the guidance of Article 17 of ULIS restored according to which at the interpretations of the Convention 'regard is to be had to the general principles on which this Convention is based...'[85]

[85] A/CN.9./125–p. 43; A/CN/.9./125–pp. 15, 16

A number of opinions came to be sounded against the motion. "A judge would undoubtedly wonder what general principles were being referred to," whereas others called for attention to the circumstance that . . . "if the Secretariat does not define them every jurist from every country would prepare papers on general principles . . . which even the Working Group was unable to define . . ."[86]

Many repeatedly moved that in such cases, with regard to matters . . . not covered by this Convention, the law of the country should be applied where seller had his place of business.[87]

There were critics who feared lest this provision should deprive the parties of their right to define the law governing their contract.[88] The Working Group approved a single amendment only namely the one on 'the observance of good faith in international trade.'

The good faith of the parties is a subjective moment and will provide nothing for the judge to go by when it comes to interpret the objective content of the law correctly. In any event to the judges of countries other than those of the Common law the notion of good faith is not unknown, and since it is not only a legal but also a moral concept, it may help to achieve the uniformity of interpretation.

(48) In the background of this timid prophecy there is the recognition that, according to our present concepts, the uniformity of interpretation cannot be achieved unless through the agency of some sort of a common forum, something that is today still beyond feasibility. Still by adopting para (2) of Cart. F. we are facing the risk of having as many interpretations as there are countries acceding to the Convention. This would mean that as soon as the uniform law comes into operation it would begin to differ from itself: it would not be the uniform law which would be applied as such, but the uniform law as interpreted in the one or the other contracting country. In other words the conflicts of provisions of law would be superseded by the conflicts of interpretations. And by this the conflicts of provisions of law, whose elimination is the primary goal of any unification, would revive in the law of international economic relations and so also would uncertainty and the want of predictability come to life again.

For the purpose of the application of the conflict rules it would have to be established in the first place whether there is a gap in the law or not, and whether could the dispute be settled by an interpretation of the text. Hence the determination of the conflict would be preceded by a question of qualification (primary qualification), and by this not only interpretation would come to be atomized in as many parts as there are legal systems according to which qualification takes place, but in the one or the other concrete case the application or non-application of a municipal law would become dependent on a number of uncertainty factors. By widening the ways and means of interpretation for the judge the text has narrowed the way leading to uniformity.

[86] A/CN.9./116. Annex. II. 13
[87] Ibid.
[88] A/CN.9./125. Add. 1, p. 2.

Perhaps the joining of forces of science and practice might obviate the danger, e.g. in a manner that under the auspices of a definite institution a periodical could be started with the task to collect judgements passed on the ground of the Convention from all parts of the world, publish and mainly discuss them. Perhaps the word of science, even if it is fainter than that of a super-forum, might sound sufficiently convincing.

(49) Neither ULIS nor the TEXT answer the question whether the interpretation of the uniform law should be extensive or restrictive. Nor do they deal with the question how the rule relating to the recourse to usages should be interpreted. The policy of the TEXT is to extend its sphere of application, for in this case we should approach universality. This will say that the rule relating to the application of the usages should be interpreted restrictively. The Convention will, wherever it comes into operation, prevail as a special regulation by the side of the municipal, and an exceptional special rule should, with respect to the general, be interpreted restrictively. This would mean that in the marginal cases of application the judges would incline to determine the case in conformity with their municipal law instead of having recourse to the Convention.

Still we believe, (and with this we would begin the interpretation of the TEXT) that Article 7 states with adequate clarity that the Convention has in all cases to be interpreted extensively. This is borne out by the emphasis the rule of interpretation lays on the need for the promotion of the trend towards uniformity, by the fact that the Convention brings under regulation legal relations of an international nature, i.e. that it has been compiled for the general and not special regulation of such legal relations.

О применении соглашений ULIS и UNCITRAL и правилах их толкования

Л. Рецеи

Гаагская конвенция 1964 года о единообразном законе о международной купле-продаже движимых, материальных вещей (ULIS) еще не вступила в действие, когда Комиссия ООН по праву международной торговле (UNCITRAL) в свою рабочую программу включила разработку проекта единого права купли-продажи. За основу разработки этого проекта UNCITRAL принял текст ULIS, но во многих отношениях отошел от него. Сходства и различия рассматриваются в статье только с точки зрения сферы применения двух соглашений и правил их толкования.

Оба текста удовлетворяют требования универсальности: применение соглашения должно быть распространено на возможно широкий круг; применение национального равно как и коллизионного права исключено или сильно ограничено; признается ими автономия сторон и диспозитивный характер положений соглашения.

Текст UNCITRAL является более простым и его санкции — более мягчими. Нет места такой оговорки, которая исключает применение соглашения в случае, не регулированном в договоре.

ULIS ставит объективные и субъективные условия для применения соглашения. Перечень объективных условий упустили из текста UNCITRAL, хотя они включительно содержатся в нем: соглашение может быть применено только на куплю-продажу международного характера. Что в ULIS появляется как норма права, то здесь только вопрос квалификации.

Между двумя текстами есть различие и в отношении видов сделок, не подпадающих под действие соглашения.

Что касается сферы применения, автор статьи делает окончательный вывод, что текст UNCITRAL — по сравнению с ULIS — суживает круг применения, но расширяет круг договоров, подпадающих под действие соглашения. Регулирование в нем тоже является более простым и обозримым.

Основное различие по вопросу толкования состоит в том, что при толковании ULIS необходимо обращаться к тем основным принципам, которые выясняются из соглашения; значит нет внешнего источника права для заполнения хиатуса. Текст UNCITRAL позволяет судье обращаться к праву, применяемому по коллизионной норме. Правила толкования по обоим текстам представляют судье широкие возможности и вследствие этого есть опасение, что из-за различного толкования единообразное право по разному применяется в странах, ратифицирующих соглашение.

Über die Anwendungs- und Auslegungsnormen der ULIS und UNCITRAL Abkommen

L. Réczei

Das Haager Abkommen von 1964 über den Kauf von beweglichen Sachen (ULIS) trat noch nicht in Kraft, als das UNCITRAL die Ausarbeitung eines neuen einheitlichen Kaufrechtsentwurfs in sein Arbeitsprogramm aufgenommen hat. Bei der Ausarbeitung seines Projekts nahm das UNCITRAL den Text des ULIS als Grundlage, jedoch mit zahlreichen Abweichungen. Die Abhandlung untersucht die Übereinstimmungen und Abweichungen nur aus dem Gesichtspunkt der Anwendung der beiden Abkommen, beziehungsweise aus dem Gesichtspunkt der Auslegungsnormen.

Den Anforderungen der Universalität trachten beide Texte nachzukommen: die Anwendung des Abkommens soll sich auf ein je breiteres Gebiet erstrecken, die Anwendung der nationalen Rechte soll ausgeschlossen oder stark eingeschränkt werden, genauso was die rechtlichen Zusammenstöße anbelangt, es wird die Autonomie der Parteien und der dispositive Charakter der Verfügungen des Abkommens gewahrt.

Der Text des UNCITRAL ist einfacher, seine Sanktionen milder. Einen Vorbehalt, der die Anwendung des Abkommens in Fällen, die durch das Abkommen nicht berührt sind, ausschließen würde, gibt es nicht.

Das ULIS knüpft die Anwendung des Abkommens an subjektive und objektive Bedingungen. Die Aufzählung der objektiven Bedingungen fehlt aus dem Text des UNCITRAL, implizite sind diese jedoch darin enthalten: das Abkommen kann nur für Kaufverträge internationales Charakters angewendet werden. Was im ULIS ein Rechtsnorm ist, ist hier ein Qualifizierungsproblem.

Auch in Hinsicht auf die aus dem Abkommen ausgeschlossenen Geschäftsarten besteht zwischen den beiden Texten Unterschied.

Die Konklusion der Abhandlung in Bezug auf das Anwendungsgebiet ist, daß der Text des UNCITRAL im Vergleich zum ULIS den Anwendungsbereich einengt, das Feld der unter den Wirkungskreis des Abkommens gehörenden Verträge jedoch ausbreitet. Auch seine Regelung ist einfacher und überblickbarer.

Bei der Frage der Auslegung ist die größte Abweichung, daß bei der Auslegung des ULIS jene Grundprinzipien gelten müssen, die aus dem Abkommen selbst hervorgehen; es gibt also keine äußere Rechtsquelle um Lücken auszufüllen. Der Text des UNCITRAL gestattet jedoch, daß der Richter von dem gemäß der Kollisionsregel anzuwendenden Recht Gebrauch macht. Die Auslegungsnormen gewähren dem Richter gemäß beiden Texten große Freiheit, wodurch die Gefahr besteht, daß das einheitliche Recht infolge der abweichenden Auslegungen in den das Abkommen ratifizierenden Ländern in abweichendem Sinn zur Anwendung gelangt.

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Procedural rules in the Hungarian private international law

J. BACSÓ

Head of Department
Ministry of Justice

The Presidential Council of the Hungarian People's Republic has enacted the code of private international law. The Code entered into force on July 1st, 1979, comprises the entire field of the private international law: in addition to the civil law, family law and labour law, also the provisions of international civil procedural law.

The general provisions of the Code are decisive also for procedural questions. Foreign law is applied if any foreign element is involved in the legal relationship. Although the Hungarian courts and other authorities apply, as main rule, the Hungarian law in their procedures, in exceptional cases the foreign law can be also applied (capacity to sue, delivery, etc.). The public policy may exclude the application of a given concrete foreign procedural rule. The Code does not know, however, the reprisal as instrument of the private international law.

The rules of jurisdiction can make distinction between cases falling exclusively under the jurisdiction of Hungarian courts and other authorities, they know the parallel jurisdiction and in certain cases, they exclude the competence of Hungarian courts and other authorities in foreign affairs.

The Code regulates the existence of international pendency and the mode of its removal. It regulates the recognition and enforcement of foreign decisions. With respect to the latter, no separate procedure *(exequatur)* exists. The Hungarian courts and other authorities declare the recognition and enforceability by taking the concrete measures.

The Minister of Justice issues certificate on any valid (or formerly valid) Hungarian statutory provision, on legal practice and on the lack of a legal rule for vindicating rightful claims abroad.

The Presidential Council of the Hungarian People's Republic has enacted in 1979 the Law-Decree on the Code of private international law. This Law-Decree is the Code of Hungarian private international law (Law-Decree No. 13 of 1979, further on it will be referred to as "Code"). It regulates comprehensively the complete field of private international law, including the provisions relating to the international law of procedure, the jurisdiction, the recognition and enforcement of foreign decisions.

The roots of this Code trace back to 1948. A draft bill was elaborated just at that time, it was not, however, enacted.[1] The reason thereof is to a considerable extent that, at that time, the international atmosphere did not correspond to the endeavours for

[1] The draft made by professor István Szászy was rewritten in form of a draft bill. Cf. SZÁSZY, I.: *Magyar nemzetközi magánjog* (Hungarian private international law) Draft bill and motivation, Budapest, 1948.

framing the code of private international law assuming a peaceful coexistence and co-operation. The other reason of the code of private international law being inopportune was that the Hungarian Parliament has enacted in 1949 the Constitution of the Hungarian People's Republic underlying the establishment of socialist legal institutions, the enactment of socialist codes.[2] It is thus obvious that in 1948–1949 the code of private international law could not yet have been enacted since the socialist statutory provisions on the internal substantive law and law of procedure serving for basis of the code have not yet been enacted.

The standpoint of codification was therefore that instead of the enactment of a uniform code of private international law—parallel to the elaboration of socialist codes—the internal statutory provisions should contain also the most important provisions of private international law. It has come correspondingly—simultaneously with the framing in 1952 of the rules of civil procedure—in the Law-Decree No. 22 of 1952 validating it to the enactment of the most important rules of international procedure, whereas parallelly to the enactment of the family law in 1952, in the Law-Decree No. 33 of 1952 validating it to the enactment of rules of private international law of family relations. Since the family law was in close connection with the personal law, the latter law-decree regulated the various questions of personal law (majority, legal capacity) and the rules of private international law related closely thereto.

The provisions of private international law applied subsequently in our international treaties (bilateral treaties on legal assistance, other multilateral treaties, etc.)—relating also to other legal fields above the fields regulated hitherto.

As a consequence thereof, such a situation arose that—apart from the international treaties—the rules of private international law contained in internal statutory provisions regulated only the questions being in close connection with the basic statutory provision itself. The general rules i.e. the provisions touching upon all fields of the private international law (such as the applicable law, "foreign element", *renvoi,* reciprocity, legal judgement, etc.) were not codified. They survived as provisions of international customary law. The statutory regulation of several provisions of law of procedure of international relation were similarly lacking.

With the enactment of Civil Code the socialist Hungarian legal system was established. Therefore, the idea of the framing of a uniform code of private international law came repeatedly up. In addition, the international trade considerably increased. The motivation of the code of private international law points out: "The international economic relations of Hungary increased to a considerable extent in the recent decades... Not less dynamically developed the international passanger traffic in this period. The concrete results displaying themselves in the practical realization of

[2] MÁDL, F.: *Magyarország első nemzetközi magánjogi törvénykönyvéről* (On the first code on private international law of Hungary), Állam- és Jogtudomány, 2/1980.

The first socialist codes are: Civil Procedure, Law No. III of 1952; Family law, Law No. IV of 1952, Civil Code, Law No. IV of 1959.

the principle of peaceful coexistence: the continually expanding international trade, the manysided foreign relations of the citizens and economic organizations obviously increased considerably the significance of statutory provisions concerning the financial and personal relations of international character and among them of the private international law.?"[3]

In this way, it has come to the enactment of the Law-Decree No. 13 of 1979.[4] The Code not only summarizes the provisions contained hitherto in separate positive rules and modernizes them but also considerably extends these provisions with the rules contained hitherto mainly in the customary law. Besides, it generalizes and renders the part of the Code the provisions contained in bi- and multilateral international treaties entered already into. The Code has strived after perfection and aimed at the codification of the complete Hungarian private international law. Therefore, if with the decision of any litigation some question of private international law arises, it should be examined in the first place whether there is or not bi- or multilateral treaty with the country in question, and whether the valid treaty regulates the matter in dispute, respectively. If the valid treaty contains the respective provision, only this one may be decisive. This provision namely has priority on the Code (Section 2 of Code). In case if—for want of those said above—the Code is applied, it should be taken into consideration that the Code strived after a complete regulation, therefore if the Code itself would not give direct answer, the Code shall be interpreted and explained by the general means of legal interpretation. In principle, it is not precluded that the question cannot be decided in this way either on the basis of the Code. Then, as a further step, the principles laid down in our international treaties shall be also involved in the interpretation.

With respect to the procedural law, the attention shall be drawn to the fact that the Code did not affect the Law-Decree No. 7 of 1973 on the procedure necessary in case of diplomatic or other immunity. This statutory provision relates both to natural persons and juristic persons if the said immunity bears on them according to the general rules of international law. The court or other authority shall proceed according to the statutory provision if in civil or administrative action another state is concerned, or some evidence is arisen that the person appearing in civil or administrative action as a party, resp. in criminal proceedings as accused or civil suitor is entitled to diplomatic immunity or other immunity based on international law. In such cases the court or other authority stays the proceedings and if in the opinion of the supervisory authority the immunity exists, it states the lack of its competence and does not take a decision, i.e. in respect of the said person it does not take any measure.

[3] Motivation to the Law-Decree on private international law. General motivation. First part: Official collection of laws and orders, 1979, Budapest, 1980, p. 136.

[4] Appreciation of works done in connection with the preparation of the Code. Cf. MÁDL, F.: *Újabb szakaszban egy korszerű magyar nemzetközi magánjogi kódexért* (In a new period for a modern Hungarian code on private international law), Jogtudományi Közlöny, 11/1978.

General provisions of the Code

The general provisions of the Code (Sections 1–9) contain the provisions relating to private international law generally decisive at the emergence of all questions of private international law. The effectiveness of the general provisions, the release of collision—in respect of procedural law—is considerably delimited by the rule according to which to the procedure at Hungarian courts or other authorities—unless the Code provides to the contrary—Hungarian law applies (Section 63). It may, however, occur that despite the above provision the general provisions of the Code are applied.

a) The Code—as generally all laws containing provisions of private international law—contains also only reference provisions. It does not contain concrete rules of conduct but states, the law of which state shall be applied if in the concrete case the law of several countries could be applied for the legal relation. This is characterized in the Code by the existence of "foreign element". This collective term comprises foreign persons, foreign assets, legal relations (foreign right). Accordingly, the application of foreign law has double condition: in the given case some kind of (above-mentioned) "foreign element" shall be present and the Code empowers the proceeding authority or court to apply foreign law instead of the Hungarian one. The Code gives answer also to the question which from several applicable foreign laws should be applied in given case.

b) The sphere of application of the Code is more closed in respect of procedural law than in the field of substantive law. While from among the legal relations of substantive law it refers equally to the legal relations of civil law, family law, labour law, independently of the fact which authority (court or administrative authority) proceeds, from among the procedures such general provision may be settled only for the court proceedings whereas from the proceedings of administrative authorities these ones fall under the competence of the Code which have civil-law character (e.g. the protection against trespass falling under the competence of state administration), those having family-law character (guardianship, adoption, etc.), those being of labour-law character (procedure of arbitration of labour). The Code does not refer, however, to such procedural rules of authorities which fall outside this domain (taxation, other financial procedure and procedures of social insurance).

c) The characterization means the statement of the fact that a legal relationship or legal institution is related to or agree with which other legal relationship or legal institution (known in the domestic law) i.e. how it shall be interpreted when applying the Code making use of the Hungarian legal notions. If the Hungarian law does not know a legal institution or knows it with different content or under different denomination and this legal institution cannot be defined by the application of the provisions of Hungarian law either, in the characterization the foreign law regulating the legal institution shall be also taken into consideration. The Hungarian law does not know e.g. the revision as a—normal—legal remedy of third instance. Therefore, if such

a legal institution occurs, with the application thereof also the foreign legal notion shall be correspondingly taken into consideration. The absolute termination of proceedings occurs in the given foreign law only after the resort to the legal remedy of third instance (revision). The stipulation of foreign law may be, however, important also from other point of view. Thus e.g. in case of the statement of pendency (Code, Section 65) when may the procedure be considered instituted, and pending, respectively, or when can it be considered definitely settled. In case of recognition and enforceability namely, it may be the impediment to a new procedure and decision in Hungary.

d) The Code regulates how the content of foreign law shall be defined. Previously our procedural law knew it as "evidence of foreign law". This definition is rendered more precise by the Code which definitely knows the evidence of foreign law by the invitation of expert opinion. This is important because the principle of *"iura novit Curia"* is absolutely valid at the Hungarian court in respect of Hungarian law but in case of foreign law—in addition to the acquisition of texts of the respective legal rules—also the hearing of expert may occur.

e) According to the Code, the application of foreign law is excluded in three cases: if it commits offence against the public policy *(ordre public)* if a fraudulent connection occurred (for the sake of the application of a foreign law) or the parties explicitly requested the application of foreign law.

From among the above-mentioned cases the fraudulent connection is not frequent though it may occur e.g. by change of domicile, by the establishment of representation, in order to deprive the case of the competent court. The disregard of foreign law may also seldom occur since the Hungarian court proceeds according to the Hungarian law, the parties have no possibility for choice in this respect. The possibility of occurrence of action or behaviour offending the public policy is, however, brought up. When stating whether the foreign law offends the public policy, according to the motivation of the Code "the socialist legal systems follow the notion that it is exceptional and of protecting character, serves for the protection of the existing law and order and cannot be used for discriminatory purposes ... It is therefore declared that the application of foreign law cannot be disregarded therefore alone because the socio-economic system of the foreign state in question differs from that of our state".[5]

In the field of procedural law, a statutory provision offending the public policy may appear in such cases when it violates significant fundamental rights. Thus e.g. according to the Hungarian procedural law the legal capacity to sue corresponds to the substantive legal capacity (Civil Procedure Code, Section 48). And according to the Hungarian civil law, this is equal for everybody, irrespective of age, sex, race, nationality or religious affiliation. A contract or a unilateral declaration restricting

[5] Motivation of the Code. Detailed motivation to Sections 1–9, point 5/e ib. p. 138. According to para (2) Section 7 of the Code: "The application of foreign law cannot be disregarded alone because the socio-economic system of the foreign state differs from that of our state."

legal capacity shall be deemed null and void (Civil Code, Section 8). According to the above rule this is therefore decisive also for the legal capacity to sue. Consequently, any restriction or exclusion of legal capacity to sue is contrary to the Hungarian public policy, therefore the foreign provision relating thereto cannot be applied. The Code defines expressly a rule of public policy for rendering legal assistance (Sections 67–68), as well as for the application of foreign legal rules in rendering legal assistance (Section 68). The Code mentions similarly definitely the public policy as impediment when deciding about the recognition of decision passed abroad (Section 73, point a).

f) Similarly, to the general provisions belongs also the conclusion to be drawn from the Code according to which the Code does not contain any provision on the reprisal. The Code did not formulate it as an instrument of private international law referring also thereby to the improvement of the atmosphere of international co-operation. This is true especially with the wide-ranging recognition and execution of decisions, including among others the release of the much-discussed provision which did not previously recognize the judicial decree of divorce passed abroad.[6]

Significance of rules of procedure in the Code

The rules of procedure of the Code are characterized in that they do not remain within the framework of court proceedings but comprise also the proceedings of other authorities, thus e.g. of the public administration. At the same time, however, this range is narrowed down by the definition from the side of substantive law of the effect of law (cases of civil law, family law and labour law). Within it, however, the Code strived after perfection. It regulated, correspondingly, all procedural questions which might come up in international relations. A separate part deals with the jurisdiction, with the rules of civil procedure in stricter sense. To the latters belong the law decisive for court proceedings, the legal capacity and disposing capacity to sue, as well as the regulation of international pendency, and finally the issue of certificate on law and legal practice. The Code regulates the international legal assistance and its letters rogatory as well as the recognition and enforcement of the decisions. The regulation is characterized in each field, thus also in respect of procedural law, by the versatility, by the striving after differentiated solutions.

There are, however, procedural institutions which are not separately regulated in the Code, but at the same time, bi- or multilateral agreements on legal assistance contain such provisions. The Code does not rule, e.g., on exemption from costs, on the conditions of provision for the security for law costs, on the use of native language, or generally on the possibilities of institution of an action, and of the performance of procedural actions, respectively, for foreigner. The fact, however, that no separate provisions exist, does not mean that these questions would not be settled in

[6] MÁDL: op. cit. (note no. 2.)

international respect. In respect of these questions, namely Section 63 of the Code is decisive, according to which, unless provided to the contrary, to the procedure at Hungarian courts the Hungarian law applies. It follows that also a foreign national can institute a lawsuit before Hungarian court under the provisions of Hungarian law (if this is not precluded by the rules of the jurisdiction) and he may be also the defendant in a lawsuit instituted in Hungary (if there are rules of jurisdiction and competence for this case). Nobody shall suffer any disadvantage because of not having command of the Hungarian language—neither a foreign national (*Civil Procedure* Code Section 8). The translation costs of an application submitted in foreign language are advanced by the state and they will be charged to the account of the party losing the suit. (Order No. 7/1972 (XI. 28.) of the Minister of Justice, Section 19). If, therefore, the foreign national is the losing party, he shall refund also the expenses of translation. This means, however, not some measure rendering more difficult the institution of a lawsuit for the foreign nationals, i.e. not a reprisal, but is the consequence of the rule that according to the Hungarian law the party losing the suit is ordered to pay the law costs.

For the exemption from costs and for the provision of security for law costs similarly the provisions of Civil Procedure are decisive, provided that a bi- or multilateral international treaty makes no exemption thereto. Accordingly, also a foreign national may be relieved of the payment of law costs, if international treaty or reciprocity orders in this sense. The provisions of Civil Procedure refer therefore to the international agreement, but allow also the reciprocity (Section 85). According to the court practice, the designation "foreign national" means in each case a foreign subject, and a stateless person resident abroad judged from the same angle, respectively. For a Hungarian national the exemption from costs can be granted even in case if he is resident abroad. The Civil Procedure expressly provides about the security for law costs (Section 89) but in case of a foreign national it similarly refers to the international agreement or reciprocity. The foreign national (which means here, too, the foreign subject or the stateless person resident abroad) may also be exempted from the obligation of providing a security for law costs only on the strength of an explicit stipulation of an agreement or of the reciprocity practice.

Jurisdiction

The jurisdiction "means the division of cases between the states".[7] The provisions on jurisdiction lay down the authority of which state can act in civil-law cases. According to another definition, the jurisdiction is the right originating from the sovereignty of the state to act with state means in legal relationship containing foreign element (i.e. to decide through the courts or administrative authorities).[8] The fact that

[7] NÉVAI, L.–SZILBEREKY, J.: *Polgári eljárásjog* (Civil Procedure), Budapest, 1977. p. 169.

[8] VILÁGHY, M.: *Bevezetés a nemzetközi magánjogba* (Introduction to private international law), Budapest, 1973, p. 71.

which state organ, namely the court, the administrative authority or other authority proceeds, is decided not by the rules of jurisdiction but by other internal rules, provisions concerning the court proceedings.

Also the Code contains provisions in this sense. While emphasizing in principle that Hungarian courts or other authorities have jurisdiction in any case (Section 54) if its jurisdiction is not excluded by the Code itself, it establishes the exclusive and excluded jurisdiction, and renders possible the stipulation of jurisdiction, respectively.

a) The exclusive jurisdiction of Hungarian state means that in the given case only Hungarian courts or other Hungarian authorities may proceed. As a matter of course, the Hungarian statutory provisions can oblige no foreign state to abstrain from the proceedings in case of exclusive jurisdiction of Hungarian authorities. Whether a foreign court or authority proceeds in the given case, is decided by her own code on private international law, or other internal legal rules. Accordingly, it may occur that foreign courts or authorities proceed, moreover, they pass decisions in such cases, too, in which Hungarian law reserved the right to the exclusive jurisdiction. This duality is released by the recognition and enforcement of decisions. Consequently, if the courts or other authorities of Hungarian state have the exclusive jurisdiction, the Hungarian state does not recognize and enforce at all or recognizes and enforces only in cases enumerated in the Code the judgement or other decision of foreign court or of other foreign authority.

In addition to the exclusive jurisdiction, the Code regulates also the excluded jurisdiction. This means essentially that a given state observes the exclusive jurisdiction of another state and forbids to her own courts and other authorities to proceed in such cases.[9] It should be decided in this respect whether this enumeration of the Code is closed, that means, whether only a separate statutory provision may exclude the jurisdiction of Hungarian authorities in cases other than enumerated in the Code. If the enumeration is closed, a further conclusion could be drawn that—since no separate statutory provision exists today (not to mention, of course, the bi- or multilateral international agreements which may contain such stipulations)—besides those enumerated in the Code no excluded jurisdiction exists, in other words, the cases not enumerated here could not be said to be such ones for which the Hungarian state has no jurisdiction.

In addition to the "exclusive" and "excluded" jurisdiction the Code does not know such a notion that in given case the jurisdiction "is lacking". It is beyond doubt that in case of excluded jurisdiction the "lack" of jurisdiction can be spoken about but even if the provisions relating to the excluded jurisdiction would be considered a comprehensive enumeration, there are cases which have no relation to the personal and territorial sovereignty of the Hungarian state, moreover, the action of Hungarian

[9] The designation "Excluded jurisdiction" is justly criticized. (Cf. NÉVAI–SZILBEREKY, op. cit. p. 171.) A more correct expression would be in the Code: the Hungarian states has no jurisdiction. Otherwise, also point a) para (1) Section 130 of Civil Procedure speaks about the "lack" of jurisdiction. Later it will be separately dealt with.

courts or other authorities would be fully unnecessary because not only abroad the decision would not be valid but also in Hungary it could not be enforced. In the practice, namely such cases are to be found which are not enumerated in the Code, all the same it is by reason presumable that here the category of "lack of jurisdiction" is faced.

As for the internal structure of the Code—comparing Section 55, and Sections 56–59, respectively—it seems to be obvious that in addition to the exclusive regulation of Hungarian courts or other authorities, the Code recognizes the jurisdiction of foreign courts (other foreign authorities) by the fact that in certain cases it excludes the jurisdiction of Hungarian courts (other authorities). Sections 56–59 do not contain, however, fully identical range with the Section 55—enumeration of exclusive jurisdiction. As against the cases falling under exclusive jurisdiction (points a)—g), 7 categories of cases) four categories of cases are to be found under excluded jurisdiction (points a)—c) Section 56, further Sections 58–59 relating to personal status), completed by the provision referring to separate legal rule (point d) of Section 56). However, no such separate legal rule exists. The bi- or multilateral international agreements are not considered namely pertaining, since the Code can be applied only if no such agreement exists.

These cases being investigated, it may be seen that the foreign equivalents of three cases from those of exclusive jurisdiction are not contained in the Code among the cases of excluded jurisdiction i.e. in this respect the Code does not prohibit the procedure of Hungarian courts or other authorities. These three groups of cases are: proceedings relating to a) immovables situated abroad, b) foreign assets and c) invalidation of negotiable instrument or deed executed abroad. Consequently, the jurisdiction of Hungarian courts is not excluded in such cases.

Before drawing the conclusions thereof, another group of cases should be investigated. Sections 58–59 of the Code—which sections belong similarly to sections under heading "excluded jurisdiction"—speak about lawsuits relating to the personal status and to conservatorship. As compared to the previous Section, the matter is here not the exclusion of jurisdiction but parallel jurisdiction is stated: Accordingly, a Hungarian court may proceed in cases relating to the personal status if either of the parties resides in Hungary (it is noteworthy that only court and lawsuit is mentioned here but no authority or administrative procedure is spoken about). Similarly, Hungarian courts may place a non-Hungarian national under conservatorship, may end the conservatorship, and the Hungarian guardianship authority may appoint a conservator or may relieve the conservator from his function, if the interested party has the residence in Hungary. In this respect also the question arises what the intention of legislator was. If as a general rule of interpretation it is understood that the excluding and restrictive rules shall be narrowly interpreted, it follows that since no exclusive provision exists in respect of lawsuit relating to the personal status, the court might proceed in a lawsuit relating to the personal status of two foreign nationals without any restriction even if neither of them has the residence in Hungary.

Nevertheless, from the provisions of the above-mentioned Sections 58 and 59 of the Code, the conclusion shall be drawn that the Code did not want to insert two permissive rules: namely did not permit in general to proceed in lawsuit relating to personal status of foreign nationals and did not give special provision for the case if the foreign party or at least one party has the residence in Hungary, but wanted to consider the latter as permissive rule.[10]

The same solution seems to be justified in case of declaration of a person dead. The main rule is the exclusion of a foreign person to be declared dead (though no explicite rule exists) and the rendering this exceptionally possible all the same if it is necessary due to home legal interest (Section 58, para (2)).

This problem being though solved through interpretation, it is difficult to find the answer to the question which solution the legislator wanted to give for foreign estates and foreign documents where namely no exclusive rule exists.[11] It is, however, obvious that the enforcement of a decision relating to an estate situated abroad can not be realized. But neither here the jurisdiction of Hungarian court can be considered absolutely excluded. If, namely, the proprietary right to the immovables is contestable (may it be e.g. in case of succession controversies) or some contract relating to the real estate is contested, a decision may be passed also in Hungary in the relation between domestic parties. The situation is, however, not so unambiguous if in this connection arrangements should be made which would relate e.g. to some registration concerning the real estate. Hungarian courts or authorities cannot order foreign courts or authorities to do it.

A decision invalidating a foreign deed may have in principle a domestic effect in respect of parties resident in Hungary. On account of the legal interest the jurisdiction of Hungarian court or other authority cannot be therefore definitely excluded. All these render problematic the response to the question whether the provision relating to the excluded jurisdiction in the Code is a closed and exhaustive enumeration or—if not so—whether the application of other provisions accepted in the private international law is justified on the strength of customary law. Such a principle of significance is that the precondition of jurisdiction is an effective relation to the Hungarian state.[12] Since, however, the jurisdiction is in connection with the territorial and personal sovereignty of the state, this relation has an effect on the extent of jurisdiction. Obviously, the

[10] According to Section 58 of the Code "In cases of non-Hungarian nationals relating to their personal status ... a Hungarian court may proceed, if either of the parties resides in Hungary". The Code does not use such expression as "may proceed only ...". Moreover, the interpretation contained in the text is supported by that a previous text excluded Hungarian courts to proceed in cases of foreign nationals relating to their personal status, and to this rule the cited provision made an exception.

[11] With respect to inheritance, such provision was contained in Section 29 of the order 6/1980 (VII. 1.) IM of the Minister of Justice, according to which the notary public can conduct the administration of the will relating to the immovable and movable properties bequeathed abroad of Hungarian national on the basis of the injunctions of the Minister of Justice. This provision, however, became void due to Section 75 of the Code.

[12] RÉCZEI, L.: *Nemzetközi magánjog* (Private international law), Budapest, 1961. p. 107.

Hungarian courts or other authorities cannot take such measures which go beyond the territory of the Hungarian state. All these being taken into consideration, the acceptance of the standpoint seems to be justified that the enumeration in the Code is not closed but in cases when none of the parties is resident in Hungary, the asset in question itself is not in Hungary or the action was not accomplished in Hungary, the lack of jurisdiction shall be stated.[13]

May either the Code exclude directly the jurisdiction, or should the rules based on international customary law be employed, the result is in both cases identical. The matter is the lack of jurisdiction and its consequences from the point of view of procedural law shall be drawn.

The consequences of lack of jurisdiction are definitely regulated by the Civil Procedure. Therefore, if the court observes the lack of jurisdiction, the petition is rejected without issuing a summons (point a) of para (l) Section 130). If, on the other hand, the lack of jurisdiction was noticed in the course of the lawsuit, the court shall discontinue the lawsuit (point a), Section 157). Against a judgement passed in default of jurisdiction and come into force, protest on legal grounds can be lodged by virtue of violation of law. Theoretically, it is challanged what effect the judgement passed in default of jurisdiction come into force and not contested by protest on legal grounds has. The Hungarian procedural law does not know the invalid, resp. void judgement, consequently, this would be formally a judgement as valid as it would be if the lack of jurisdiction would not exist.

b) The Code renders possible also the stipulation of jurisdiction, on three conditions:

aa) The stipulation shall be made in writing, i.e. it shall be definite and clear. The Code does not order as for the form of stipulation. It may be thus a paragraph of the contract, the litigations rising therefrom are e.g. intended to be settled by the court, it may be the clause of the contract, or it may be a separate contract relating to the jurisdiction of an ordinary court or of an arbitration court. Further, the stipulation may consist of two deeds of concordant content. In addition to the requirement of being written the Code does not require a more severe form (e.g. official document). The mode of stipulation may be either exclusive or simple. In case of a simple stipulation also the court having generally competence with respect to the given case may proceed. For want of contractual stipulation to the contrary, here practically the precedence will decide in the choice of the plaintiff. If, however, the stipulation contains exclusive jurisdiction, only the ordinary or arbitration court can proceed the jurisdiction of which is stipulated by the parties.

bb) Either the ordinary or the arbitration court can be stipulated only in case of contracts of economic content. The designation "of economic content" relates to cases of obligation-law character, more precisely, to trade (foreign trade) affairs. In other

[13] VILÁGHY., op. cit. p. 76.

cases, i.e. in cases not of civil law character, or such, but not of obligation-law character (e.g. with respect to law of succession) no such stipulation is possible.

cc) The stipulation is possible only for economic affairs of "international" relation. Consequently, the foreign element appears in the contract by that one of the parties is a foreign national.

The Code contains no further clause. The contracting parties may be either private persons or juristic persons. In respect of Hungarian private person no such stipulation is possible since he cannot enter into economic contract of international subject—foreign trade contract (Law No. 11 of 1974, Section 3).

Irrespective of this fact, a private person could not deprive the ordinary court procedure of the case even through the arbitration court since this is excluded by Section 360 of Civil Procedure.

In case of a stipulation corresponding to the Code—if it is exclusive—no other court can proceed. The procedural-law consequences thereof may be drawn on the basis of Sections 130 and 157 of Civil Procedure. If the wording of the Code is followed, the matter is here the stipulation of jurisdiction. Therefore, if the ordinary court cannot proceed in case of exclusive stipulation, the procedural consequences thereof may be drawn on the strength of point a) para (1) of Section 130, i.e. on the strength of lack of jurisdiction

In our opinion, however, the provisions relating to the stipulation of jurisdiction of the Code involve even two elements. On the one hand, it does not define only that some ordinary or arbitration court can proceed but at the same time—as the stipulation of jurisdiction in strict sense, indeed—to the sovereignty of which state the litigation is submitted. The stipulation according to the Code may thus determine both the jurisdiction and the judiciary way.

c) The Code does not mention the parallel jurisdiction. This is, however, not necessary since "each case in which the state of the proceeding court or other authority does not consider exclusive or does not exclude its own jurisdiction, fall under a parallel jurisdiction."[14] This provision is decisive, in the first place, for cases of compulsory character—of economic relation. The fact which court or other authority proceeds, depends also thereon whether the internal staturory provisions of the given state render possible in such cases the institutions of a lawsuit at home. The answer thereof may be found among the provisions of competence. Although the main rule is always that the domicile, and headquarters, respectively, of the defendant determines the competency, thereto also the Civil Procedure makes exceptions. Thus, among the general rules of competence, it knows the competence based on the domicile or dwelling-place of the plaintiff (Section 29). Thereby, also the plaintiff residing in Hungary and thus the Hungarian subject is put in favourable position because the possibility is given him to bring an action before a Hungarian court against the defendant who never has had a domicile or dwelling-place in Hungary. The other rule

[14] RÉCZEI, op. cit. p. 108.

of competence (Section 32) relates to lawsuits relating to property rights. According thereto namely against a defendant who has neither a domicile nor a dwelling-place in Hungary, a lawsuit relating to property rights may be instituted also before the court in whose territory the subject of lawsuit is situated or in whose territory a seizable property of the defendant is to be found. In addition, lawsuits relating to property rights may be brought against foreign juristic persons also before courts in whose territory such foreign juristic person has its permanent representation or the person entrusted with the administration of its affairs is domiciled.

In the concrete case the parallel jurisdiction means also that the plaintiff makes the choice, before the court of other authority of which state he will institute a lawsuit. At the same time, in case of parallel jurisdiction, the recognition and enforcement of the decision passed by the court (other authority) of another state cannot be refused only for the simple reason that the court (other authority) of the own state could have proceeded in the case. For other reasons, however, the recognition or enforcement can be refused.

d) Some comments will be now given on certain cases of exclusive and excluded jurisdiction:

aa) Hungarian courts or other Hungarian authorities have exclusive jurisdiction in a procedure against the Hungarian state, against a Hungarian state authority or administrative organ. In accordance therewith the jurisdiction of Hungarian courts is excluded in a procedure against a foreign state, a foreign state authority or administrative organ. This latter means, of course, that in this respect the Code recognizes the jurisdiction of the foreign state (point d) of Section 55 and point c) of Section 56).

These provisions bear upon that in respect of jurisdiction and procedural law the Code accepts the immunity of state. Accordingly, the state can be judged only on the strength of its own laws, therefore against the state no lawsuit can be instituted before the court of another state, and no execution can be issued for her property.[15] The Code follows this conception. It does not make difference whether the given case is in connection with the public-power activity or with an activity independent thereof of the state.

This provision must not be, however, investigated without the other rule according to which the Hungarian civil law makes distinction between the state, the state authorities and administrative organs and the enterprises of the state. All of them are juristic persons independent of the state, having independent property. State enterprises appearing in the foreign trade are not under the effect of state immunity. Consequently, in Hungary the absolute immunity asserts itself only in respect of the state as a totality, as a sovereign. The provision relating to the substantive law to be applied is in connection with this provision. According to the Code (Section 21) the own law shall be applied for the state, except for the case if the state agreed with the

[15] VILÁGHY, op. cit. p. 93.

application of foreign law, the legal relationship refers to a foreign immovable intended to be acquired by the state, and if the legal relationship refers to the participation in an economic organization of foreign interest, respectively. No such exception exists, however, in respect of jurisdiction. On the other hand, in respect of the substantive law to be applied, the Code contains no stipulation at all, concerning either the organs of state or the administrative organs, or the state enterprises. The rules of jurisdiction, however, bring the state-power organs and administrative organs under the same category as the state.

The complete freedom is therefore only due to the state enterprises from among the state organs: the obligatory application of some law does not relate—generally—to them and no obligatory jurisdiction exists in their respect.

bb) In the lawsuit relating to the personal status of Hungarian national the jurisdiction of the Hungarian courts or other authorities is exclusive—except if a foreign decision must be recognized. The Code speaks about the recognition of a decision given in the divorce case of a Hungarian national domiciled abroad, of decisions passed in lawsuits relating to conservatorship, and of the decision relating to adoption, respectively (Section 71).

In this respect the contested question may be that there is no Hungarian statutory provision which would lay down what can be qualified as lawsuit or case on personal status. In addition to the four proceedings relating to the personal status definitely regulated (in lawsuits concerning the marriage, origin, parental supervision and conservatorship) other procedures can also be included here. The adoption and the declaration of death belong obviously to this range, it is, however, contested whether the placement of the child is subject to a procedure relating to personal status. In our opinion, this case shall be included here since the placement of the child with one of the parents has an effect on the supervisory right of the parent, i.e. on his personal status.

Provisions on procedure

Chapter X of the Code bears the title "Rules of Procedure". Although the legal assistance as well as the recognition and enforcement of decisions are also connected with procedural law, the Code treats these latters in a separate chapter. The chapter contains correspondingly only a part of the provisions on procedure and as already referred to in the introduction, some of them are not included in the range of regulation.

a) For the procedure—as main rule—the law of the state of the proceeding courts or other authorities applies. (Section 63). Other rules of procedure can be applied only if the Code itself provides in this sense. Such provisions are to be found e.g. with rendering international legal assistance, where, upon the request of the court demanding the legal assistance, foreign legal rules may also be applied, provided this does not violate Hungarian public policy (thus, the delivery may be effected not only

through the post but e.g. through the bailiff and although in the lawsuit no oath is accepted, some statements can be confirmed by extrajudicial affidavits or oaths).

b) As for the legal capacity to sue the Code has maintained also the previous statutory provisions. Accordingly, with respect to the legal capacity and disposing capacity, the personal laws of the parties are decisive. According to the Code, the personal law derives from the law of that state the national of which the person is. In case of juristic person the personal law derives from the law of the state in whose territory the juristic person is incorporated.

The Code maintains further on the previous rule according to which a foreign national who under his own personal law has no or restricted disposing capacity only, but would have disposing capacity under Hungarian law, shall be considered as having disposing capacity before Hungarian courts and other authorities. No separate provision exists in respect of legal capacity because if somebody would have no legal capacity under his own foreign law, the recognition of this fact as restrictive provision depriving of rights would be excluded by the Hungarian public policy.

No separate provision is contained in the Code in respect of juristic persons. Instead of the juristic person having no disposing capacity, its legal representative proceeds at all events, and in this connection no provision is contained in the Code. No such rule is, however, known which would render possible that an organ having no legal capacity—i.e. juristic personality—would have a legal capacity to sue. This is not at all necessary since if the foreign national has legal capacity to sue under his own personal law, this fact is recognized by the Code (Section 64).

c) An old deficiency is remedied in the Code by regulating the international pendency (pendency of administrative procedures) (Section 65). According to this provision namely, if between the parties a procedure originating in the same factual basis and for the same claim is instituted at a foreign court or other authority, in which the decision is to be recognized as valid and enforceable in Hungary, at the Hungarian court or other authority no procedure can be instituted. The filed petition shall be therefore dismissed without issuing summons, and the procedure being pending shall be discontinued, respectively. At an organ of public administration, the consequences thereof will be the discontinuance of the procedure.

The Code does not give direction what is to be done if a Hungarian court or other authority passed later also a decision in merits. In the opposite relation, if the Hungarian court or other authority had passed earlier a decision in merits, the decision passed abroad relating to the same parties, with respect to the same right, derived from the same facts cannot be recognized (point d), Section 73).

In our opinion, however, the legal position is settled even if in the above-mentioned case the Hungarian court or other authority was ignorant of the decision passed earlier abroad and passed a decision in merits. If, namely, such a foreign decision is concerned which shall be recognized and which is enforceable in Hungary, respectively, essentially the same situation occurs as if a Hungarian court or other authority would have passed a final decision. The decision passed later by a Hungarian

court may be declared invalid due to a protest on legal grounds or due to re-opening of the case. If, on the other hand, the foreign decision cannot be recognized, the situation is as if no decision would exist, therefore the Hungarian court or other authority may proceed.

d) The Code codified also the rules of issue of certificate on law. This belongs further on to the competence of the Minister of Justice. As against the previous positive regulation (Law No. LIV of 1912, Section 101) such a certificate can be issued not only on the law but on the practice of courts or of organs of public administration. Thereby the Code codified not only the positive provisions but also the practice developed effective in the meantime. According to the previous dispositions, the certificate could be also negative (no statutory provision for the given case existed). Although the Code does not mention it, the issue of such a certificate cannot be considered impossible.

e) With the performance of procedural actions—delivery, evidence, etc.—the court or other authority of each state is bound to its own territory, and cannot perform such actions in the territory of another state. For this purpose the assistance of the other state is required. This assistance rendered by the other state is the legal assistance.[16] The principles thereof are laid down in the Code when establishing two fundamental rules: through which channel the Hungarian and foreign courts or other authorities are in contact, on the one hand, and which law shall be applied in the course of the procedure, on the other hand. The contact is ensured through the supervisory authorities, the applicable law, however,—if it does not violate public policy—may be also a foreign law.

Recognition and enforcement

The recognition of decisions of courts and other authorities means that the judgements or decisions passed abroad become valid at home as if they would have been passed here. No separate judgement shall be passed in Hungary in the case in question for the enforcement of the decision contained therein.

For the enforceability of a judgement or decision its recognition is required at any rate. A judgement or decision which cannot be recognized is not enforceable. The enforcement has, of course, also other conditions.

The recognition is informal also according to the Code. This means that no formal judicial or extrajudicial procedure is necessary the aim of which would be a decision on the recognition. The recognition occurs—if the judgement or decision fulfils the conditions—in that way that the state takes the necessary measures—e.g. the divorce is entered in the Hungarian register or on the strength of the judgement execution is levied.[17]

[16] RÉCZEI, op. cit. p. 349.

[17] Otherwise, it is contested in the theory whether the legal effect of enforceability is attached to the decisions forming the law or to those containing statement. (NÉVAI—SZILBEREKY, op. cit. p. 425.) It was therefore mentioned that although no enforcement is here involved, some measures, actions of enforcement "character" may occur.

The recognition has general conditions being decisive in each case. As a general rule, the foreign decision cannot be recognized if the jurisdiction of Hungarian court is exclusive. Thereto, however, the Code itself makes exception in divorce suit, in procedure for appointing a conservator, in adoption cases and in case of a Hungarian diplomatic representative, if the state waives the immunity.

There are, however, impediments of recognition, namely if

— recognition would violate the public policy,
— discriminatory competence reason was applied,
— the Hungarian party did not participate in the procedure, either because the summons has not been served to him because the procedure was unlawful,
— in the same case in Hungary a judgement or decision in merits was passed earlier,
— there is a pendency because proceedings were instituted earlier at a Hungarian court or other authority (Section 73).

The Code deals only with the enforcement of decisions relating to property right and placement of children. In addition thereto, no mention is made about the decisions not relating to property rights. This may be attributed to the fact that the decisions not relating to property rights are not included to the decisions requiring the enforcement. The recognition of these decisions involves namely the measures necessary in this respect—being, however, not of enforcement character—such as the entering in the register of judgements passed in procedures relating to the origin, to marriage, the measures taken by the guardianship authority necessary in connection with decisions relating to conservatorship, entering in the land register, etc.

If these decisions have provisions of property right character (e.g. division of common properties of spouses, payment of court costs), provisions decisive for the enforcement of decisions relating to property rights shall be applied.

Decisions concerning property right and placement of children can be enforced only in case of international convention or reciprocity.

Гражданско-процессуальные аспекты кодекса ВНР о международном частном праве

Й. Бачо

Президиум Венгерской Народной Республики в 1979 году принял кодекс ВНР о международном частном праве. Кодекс вступил в силу 1-го июля 1979 г. и охватывает сферу международного частного права в целом, значит кроме гражданского, семейного и трудового права в нем содержатся и положения международного гражданского процесса.

Общие положения кодекса являются руководящими и в процессуально-правовых отношениях. Иностранное право применяется только в таком случае, если в правоотношении содержится какой-то иностранный элемент. Хотя венгерские суды и административные органы применяют, как правило, к их процедуре венгерского право, в исключительном случае можно применять и

иностранное право (процессуальная право-дееспособность, вручение, и т. п.). Общественный порядок может усключать применение конкретного иностранного процессуального положения. В остальных случаях в кодексе не предусматривается реторсия, как средство международного частного права.

Правила юрисдикции различают дела, подсудные исключительно юрисдикции венгерских органов, признают параллельную юрисдикцию и в некоторых случаях исключают юрисдикцию венгерских органов по иностранному делу.

В кодексе регулированы случаи приостановления разбирательства по иностранному делу и способы их устранения. Кодекс регулирует, далее, признание и исполнение иностранных решений. Что касается последних, здесь нет особого производства (экзекватуры). Венгерский суд или другой орган выражает признание и исполнимость путем принятия конкретных мер.

Для зарубежного пользования министр юстиции выдает свидетельство о наличии действующего (или действовавшего) венгерского законодательного акта, о судебной практике и отсутствии какой-нибудь правовой нормы.

Zivilprozeßrechtliche Bezüge des internationalen Privatrechtskodex

J. Bacsó

Im Jahre 1979 hat der Präsidialrat der Ungarischen Volksrepublik das Gesetz über das Internationale Privatrecht (IPR-Gesetz) geschaffen. Der Kodex trat am 1. Juli 1979 in Kraft und umfaßt das volle Gebiet des internationalen Privatrechts, so das Zivilrecht, das Familienrecht, das Arbeitsrecht und daneben auch die Verfügungen über das Zivilprozeßrecht mit internationalem Bezug.

Die allgemeinen Regeln des Gesetzes sind auch in prozeßrechtlichem Bezug maßgebend. Ausländisches Recht kann nur angewendet werden, wenn das Rechtsverhältnis irgendein ausländisches Element aufweist. In der Hauptregel wenden die ungarischen Gerichtshöfe und Behörden bei ihrem Verfahren das ungarische Recht an, ausnahmsweise kann auch das ausländische Recht angewendet werden (Prozeßfähigkeit, Zustellung usw.). Die öffentliche Ordnung kann die Anwendung eines gegebenen konkreten ausländischen Verfahrensregel ausschließen. Übrigens kennt das Gesetz die Retorsion als Mittel des internationalen Privatrechts nicht.

Die Regelung der Fragen der Gerichtsbarkeit unterscheidet Angelegenheiten, die ausschließlich unter die Kompetenz der ungarischen Gerichte gehören, sie kennen aber auch den Begriff der parallelen Gerichtsbarkeit und schließen in gewissen Fällen die Kompetenz der ungarischen Organe in ausländischen Angelegenheiten auch aus.

Der Kodex regelt das Bestehen der internationalen Prozeßanhängigkeit und die Art ihrer Abwehr. Er regelt die Anerkennung und Durchführung der ausländischen Beschlüsse. Eine spezielle Exequatur bezüglich dieser letzteren gibt es nicht. Das ungarische Gericht oder die ungarische Behörde äußert durch ihre konkrete Verfügung die Anerkennung und die Durchführungsberechtigung.

Der Justizminister stellt für ausländische Verwendung ein Gesetzeszeugnis über eine wirksame (oder früher in Wirkung gewesene) ungarische Rechtsnorm, über die ungarische Gerichtspraxis, beziehungsweise über die Ermangelung einer Rechtsnorm.

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Informationes

Arbitrages entre les sujets de droit des pays de l'Est et de l'Ouest

1. Malgré la tension dans les rapports politiques est-ouest, les *relations économiques* vont progressant et un grand nombre de contrats de vente, de coopération, d'entreprise etc. sont conclus entre les firmes des pays de l'Est et de l'Ouest. D'une manière inévitable, des litigés naissent des rapports établis par contrats et les parties sont grandement interessées dans la liquidation rapide de ces litiges, afin que les relations puissent se développer sans heurts. Dans les cas de litige issus de ces rapports-là, les Tribunaux ordinaires sont moins aptes à répondre aux nécessités de la procédure que les cours d'arbitrage. Ces cours, en général, sont composées de juges en qui les parties ont confiance, qui disposent de connaissances spéciales, nécessaires, la procédure, en général, ne dure que quelques mois et n'entraîne pas de frais élevés.

2. En Hongrie, la Cour d'arbitrage pour fonctionner auprès de la Chambre de Commerce Hongroise a été instituée en 1953[1]. Il a fallu déployer une activité de *propagande* en faveur de l'arbitrage ad hoc.[2]

De nos jours l'arbitrage est une institution vivante et en plein essor, dont les résultats éminents méritent d'être connus.[3] La Cour d'arbitrage de la Chambre de Commerce Hongroise fait état de progrès notables. Chaque année, elle a examiné 200 à 210 litiges et a statué dans 180 à 190 cas, sans parler des arrangements, conclus entre les parties.[4] Tout ceci explique l'intérêt suscité par le séminaire des cours d'arbitrage est-ouest organisé à Budapest du 25 au 27 novembre 1980 par la Chambre de Commerce Internationale de Paris (par la suite CCI). L'objectif du séminaire était de faciliter l'application dans la pratique des conventions internationales conclues au sujet de l'arbitrage.[5] Ce séminaire — comme nous l'avons mentionné — avait été organisé par la CCI de Paris, mais il serait injuste d'oublier de mentionner le travail d'organisation dévoué du Secrétariat de la Cour d'arbitrage instituée auprès de notre Chambre de Commerce qui a bien contribué au succès du séminaire.

3. De nombreux rapporteurs se sont occupés des problèmes *de la clause d'arbitrage.* La conférence d'ouverture avait été en fait consacrée à ce problème. Dans la clause d'arbitrage il faut stipuler d'avance la *forme* et le *lieu* de l'arbitrage. La stipulation a lieu, soit lors de la conclusion du contrat entre les parties, soit au moment de la naissence du litige, lorsque les parties se mettent d'accord sur un arbitrage ad hoc. En cas de stipulation faite entre les parties comme clause du contrat, celles-ci mettent d'accord en général, donc la clause ne sera pas

[1] Cf. Décret 1/1953. (VII. 28) BkM du Ministre du Commerce intérieur.

[2] Cf. RÉVAI, T.: *A választottbíróság elvi kérdései a szocializmusban* (Questions de principe de l'arbitrage au socialisme), Jogtudományi Közlöny, 2/1963.

[3] JUHÁSZ, J.: *Választottbíráskodás a KGST-ben* (Arbitrage au sein du CAEM) Jogtudományi Közlöny, 11/1980.

[4] SEBESTYÉN, GY.: Discours d'inauguration du Séminaire sur l'arbitrage ouest-est, à Budapest du 22 au 27 novembre 1980. *(Megnyitó beszéd az 1980. nov. 22-27-i budapesti Nyugat-Keleti választottbírósági szemináriumon.)*

[5] LITTMANN, M.: A választottbírósági záradékok írásbeli formája és hatályossága (Forme écrite et validité des clauses d' arbitrage), conférence d'ouverture.

exactement conforme au cas, tandis qu'en cas de stipulation *ad hoc*, les parties ont plus de facilités à se retrouver et à décider des différentes questions relatives à l'arbitrage.[6]

Cette question est bien moins importante en a qui concerne contrats entre les organisations des Etats-membres du CAEM car dans ce cas c'est la *Convention de compétence de Moscou de* 1972, qui établit *ex lege* la compétence de la cour d'arbitrage, notamment celle de la cour d'arbitrage instituée auprès de la Chambre de commerce.[7] Le choix du *droit à appliquer* figurant dans la clause d'arbitrage est extrêmement important.

En ce qui concerne la forme de l'arbitrage, il faut mentionner la cour d'arbitrage permanente ou institutionnelle et l'arbitrage *ad hoc*. La Cour d'Arbitrage de la Chambre de Commerce Internationale de Paris, membre de la Chambre de Commerce Internationale coopérant avec les comités nationaux des Etats-membres est une cour institutionnelle.

Cette cour d'arbitrage est souvent saisie, aussi bien par les firmes des pays de l'Ouest que de l'Est. Elle a établi son Réglement, sur lequel nous nous étendrons par la suite. Des cours d'arbitrage permanentes fonctionnent à Londres, en Suède, en Hollande, etc.

L'avantage de la cour d'arbitrage institutionnelle réside dans la procédure, selon laquelle elle a le droit de désigner les arbitres, bien que les parties puissent également se mettre d'accord sur la forme à suivre. Son autre avantage, c'est que le Réglement prévoit la procédure et aussi les moyens techniques, les locaux, le rédacteur du procès-verbal, etc, nécessaires à la procédure de la cour d'arbitrage. Les cours d'arbitrage *ad hoc* ne disposent pas de tels avantages, cependant les parties, dans des cas particulièrement compliqués, recourent à cette forme d'arbitrage.

4. Il est important savoir si la cour d'arbitrage statue selon *la loi ou l'équité*. En Angleterre, les arbitres doivent procéder selon la loi. En France, par contre, les arbitres sont autorisés par la loi à se prononcer en tant «qu'amiables compositeurs». En Allemagne, la situation est similaire, les arbitres ne sont pas liés par la loi. Les cours d'arbitrage instituées auprès des chambres de commerce des les pays membres du CAEM doivent procéder selon les règles du droit matériel unifié du CAEM[8] et toute sentence en divergente serait illégale.

Le choix du siège de la cour d'arbitrage est essentiel, car il peut produire un effet sur la détermination du droit à appliquer. Le choix du lieu du siège est important lorsque les parties résident dans des pays différents. La CCI désigne un tiers pas neutre, qui généralement est situé à égale distance des deux pays des parties en cause.[9]

La neutralité, cependant, comporte un trait négatif, c'est que les parties ne connaissent pas le droit de ce tiers pays, qui, le cas échéant, serait appliqué.

Sur le plan international les parties saisissent souvent la Cour d'arbitrage de Londres, dont les difficultés de procédure ont été éliminées par la loi anglaise de 1979, sur l'arbitrage. En effet, le droit de contrôle du tribunal ordinaire a été considérablement réduit, les parties peuvent, exclure selon accord le droit d'appel au tribunal ordinaire, à l'exception de quelques cas.[10]

La stipulation d'arbitrage n'a qu'une importance minime dans les rapports juridiques des organisations des pays du CAEM par suite de la Convention de Moscou de 1972 sur la

[6] LITTMANN: op. cit.

[7] STROHBACH, H.: *Convention du 26 mai 1972 sur l'arbitrage dans les litiges relatifs aux rapports de la coopération économique, scientifique et technique*. Rapport présenté à l'occasion du séminaire.

[8] Conditions générales de livraison du CAEM, texte amendé en 1979 des Conditions générales de Livraison de 1968/19/75, les conditions générales des services techniques du CAEM de 1962), Conditions générales de la spécialisation de la production et de coopération entre pays du CAEM, conditions générales de la mise à disposition réciproque des cargaisons de navires et des produits destinés à l'exportation des Etats-membres du CAEM.

[9] DERAINS, Y.: *Application dans la pratique du réglement de procédure de la Cour d'arbitrage de la CCI*. Rapport, fait au séminaire.

[10] LITTMANN, op. cit.

compétence des cours d'arbitrage.[11] La question de stipulation d'arbitrage n'a d'importance que dans le cas ou il s'agit d'une firme d'un pays non-membre du CAEM. La situation est bien plus simple lorsqu'il s'agit d'organisations d'Etats-membres du CAEM, car à l'exception de la Mongolie et du Viet-Nam, tous sont parties de la *Convention de New-York de 1958,* sur la reconnaissance et l'exécution des sentences arbitrales étrangères ainsi que de la *Convention européenne sur l'arbitrage de 1961 de Genève.*

En général, la clause d'arbitrage pose le problème de l'obligation de la forme écrite, à savoir si la stipulation figure dans un accord par échange de *télégramme* ou de *telex.* La forme de document écrit ne peut se passer de la signature des parties qui ne figure ni dans un telex, ni dans un télégramme et il n'est même pas sûr que le télégramme par exemple ait été expédié par la personne figurant comme ayant signé.[12] Même cette « soi-disant » forme écrite manque lorsque le reguérant introduit sa demande à la cour d'arbitrage et le défendeur ne contestant pas la compétence *expose sa défense* devant la cour d'arbitrage.

5. Selon la plupart des auteurs d'ouvrages de jurisprudence, dans la clause d'arbitrage on doit désigner le *litige concret* touché par la stipulation ou *le rapport juridique* dont découlent les litiges sujets à éxamen par la voie d'arbitrage. Il est difficile de justifier un avis contraire et on ne peut l'accepter.[13] Dans les Etats-membres du CAEM les cours d'arbitrage des chambres de commerce en de nombreux cas, procèdent sans stipulation sur la base des Conditions Générales de Livraison ou de la Convention de Moscou sur les compétences. Sur cette base on peut distinguer l'arbitrage *spontané* d'avec celui *obligatoire.*

En ce qui concerne la stipulation de l'arbitrage *ad hoc,* le séminaire a noté très justement que la clause doit être *complète,* c'est-à-dire doit comprendre le mode et le mécanisme de la constitution de la cour d'arbitrage.

6. Au cours des débats du séminaire on s'est largement occupé de la naissance de la Convention de compétence signée à Moscou en 1972.[14] Celle-ci remonte au *programme complexe* établi en vue de l'intégration socialiste, objet de la XXV[e] session du CAEM tenu à Bucarest en 1971, qui entre autres prévoit l'élargissement de la compétence des cours d'arbitrage des chambres de commerce, au point de vue juridique (chapitre I[er], article I[er] et chapitre IV, article 13). C'est à la base des mesures mentionnées du programme complexe qu'a été constitué la commission juridiqe dite Conférence Juridique du CAEM, dans la cadre duquel des groupes de travail ont été constitués pour les différents domaines du droit. C'est ainsi qu'avait été constitué le groupe de travail pour les cours d'arbitrage, qui préparait le projet de la Convention de compétence de Moscou. Cette convention qui a été ratifiée en Hongrie par le décret loi 23 de l'an 1973 et qui est entré en vigueur le 13 août 1973, prévoit la juridiction exclusive des cours d'arbitrage des chambres de commerce dans tout litige civil entre les organisations des Etats au sujet de la coopération économique, scientifique et technique des membres du CAEM. À notre avis, les litiges nés dans le cadre de la co-opération par suite d'actes ou de conduites illégales illicites relévent obligatoirement de la compétence des cours d'arbitrage des chambres de commerce, ce qui est contraire à la position reflétée par la jurisprudence, selon laquelle il ne s'agisse que de la compétence des litiges découlant des contrats, ce qui ne toucherait pas les litiges[15] découlant d'obligations delictuelles.

Bien que au terme des diverses conditions de livraison, la disposition relative aux cours d'arbitrage ne soit pas obligatoire on ne peut imaginer une solution à disposition différant de cette disposition, par exemple en vertu du paragraphe (2) du préambule des Conditions

[11] MANOWSKI, Z. L.: *Préparation et validité des clauses d'arbitrage,* Rapport présenté au séminaire.
[12] NANOWSKI, op. cit.
[13] Cf. NANOWSKI, op. cit.
[14] STROHBACH, op. cit.
[15] Cf. STROHBACH, op. cit.

Générales de Livraison. D'ailleurs la Convention sur les compétences de Moscou est un texte plus récent et selon le principe de la *lex posterior derogat priori*, la stipulation d'arbitrage des conditions de livraison constituent une règle obligatoire.[16]

Il est notoire que les Conditions générales de livraison et la Convention de compétence de Moscou suivent le principe de la *partie défenderesse* toutefois les parties ont la liberté de se soumettre à l'arbitrage de la Cour d'arbitrage de la Chambre de commerce d'une partie tierce à la convention et ont feu vert pour saisir des cours d'arbitrage spécialisées (de telles cours fonctionnent à Gdynia, à Moscou). Nous ne désirons pas nous étendre en détail sur la convention de Moscou, car une étude détaillée y a été consacrée dans la revue « Külgazdaság » (Commerce extérieur).[17] Il faut cependant mentionner l'article V. de la convention visent refus de l'exécution de la sentence de la cour d'arbitrage, et parmi les trois causes mentionnées du refus figure l'annulation du jugement dans le pays où siège la cour d'arbitrage. Au cours des 8 années écoulées depuis la signature de la convention, non seulement aucune réglementation uniforme n'a été formulée au sujet de cette annulation mais aussi les firmes des Etats-membres se trouvent en *positions inégales*. Dans certains Etats-membres, comme par exemple en Tchécoslovaquie, en Pologne, en Roumanie la sentence de la cour d'arbitrage peut être attaquée uniquement pour la violation des formes substantielles, et en Roumanie on peut même introduire une requête civile, tandis que dans d'autres Etats comme par exemple en Bulgarie ou en Hongrie cette possibilité est exclue. Sous ce rapport le statut juridique des firmes dépend de l'Etat où la procédure se déroule. En Roumanie, la firme hongroise étant une des parties en cause devant la cour d'arbitrage peut faire valoir son prétention à l'annulation et peut même introduire une requête civile, par contre la firme roumaine apparaissant devant une Cour d'arbitrage hongrois n'a pas tel droit.[18]

7. L'autre résultat remarquable de l'activité du groupe de travail pour les cours d'arbitrage mentionné ci dessus fut l'élaboration d'un Réglementat uniforme des cours d'arbitrage des chambres de commerce, adoptée par le Comité exécutif du CAEM, sous forme de recommandation et mise en pratique par les cours d'arbitrage des chambres de commerce des Etats-membres en 1975-76. Les différentes cours d'arbitrage ont le droit de dévier des règles recommandées, en ce qui concerne des questions de moindre importance, toutefois ces différences ne peuvent pas toujours être considérées comme sans importance, car il y en a d'importentes aussi.[19]

8. L'analyse des questions relatives à la *Cour d'arbitrage* de la CCI a été un résultat notable de ce séminaire.

La Cour d'arbitrage de la CCI connaît une large variété litiges du domaine du commerce international.

Les membres de la Cour d'arbitrage de la CCI sont des ressortissants de 36 pays. La cour d'arbitrage ne tranche pas elle-même les différends mais elle met en marche et de superviser l'activité du tribunal. Le président et les arbitres sont ressortissants de pays neutres par rapport aux parties du litige. Le siège de l'arbitrage est désigné par les parties, au cas où un tel accord n'existerait pas la Cour d'arbitrage de la CCI choisit un pays neutre comme siège du tribunal arbitral.

Cette structure distingue cette Cour d'arbitrage de tout autre cour d'arbitrage fonctionnant ailleurs. Des parties de tous les pays du monde saisissent la Cour d'arbitrage de la CCI par suite de son caractère réellement international.

[16] SZALÓKY, L.: intervention au séminaire.

[17] RÉVAI, T.: *Egyezmény kizárólagos választottbírósági hatáskörről a KGST tagállamok szervezetei közötti polgári jogi vitában.* Külgazdaság, 2/1972. Convention sur la juridiction exclusive des cours d'arbitrage dans les litiges de droit civile entre organisations des Etats-membres du CAEM.

[18] RÉVAI, T.: *Egységes választottbírósági eljárási szabályzat a KGST tagállamokban.* Külgazdaság, 6/1980. Règle de procédure uniforme des cours d'arbitrage dans les Etats du CAEM.

[19] RÉVAI, op. cit. (n. 18.)

Il faut souligner *l'autonomie des parties,* aussi bien pour la désignation des arbitres que pour le lieu de l'arbitrage. La Cour d'arbitrage de la CCI n'intervient dans la procédure même, que dans le cas où les arbitres ne respectent pas les règles. Cependant, en général, les règles de la procédure sont respectée et les sentences sont dans leur majorité ou presque toutes exécutées par les parties.

La procédure elle-même comprend une *phase* préparatoire, qui se déroule devant la Cour d'arbitrage de la CCI, le but de celle-là est d'introduire la réponse et aussi éventuellement d'intenter une action reconventionnell permettre au demanteur d'y présenter sa note en réponse de constituer le tribunal arbitral devant procéder, de désigner le lieu de la procédure et de prendre les dispositions financières nécessaires.

Au début de la procédure apparaissent parfois des *obstacles typiques,* tels le retard de la partie défenderesse à la présentation de sa note en réponse, la contestation relative à la convention d'arbitrage, le refus par la partie défenderesse de participer à la constitution du tribunal.

La cour d'arbitrage de la CCI aplanit ces difficultés. Au cas où la partie défenderesse ne présente pas sa note en réponse dans un délai 30 jours, la procédure se met en marche. La déposition de la moitié de la somme de la provision permet également la poursuite de la procédure et le tribunal arbitral saisi statue lui-même en ce qui concerne les questions de compétence et de convention d'arbitrage. En ce qui concerne la désignation des arbitres, les parties peuvent profiter de tous les avantages relatifs à l'arbitrage ad hoc. En effet, elles n'ont pas à se tenir à la liste des arbitres de la CCI, ni à leur nationalité. Il est possible de stipuler que les arbitres désignés par les parties (un par chacune) choisissent eux-même leur président. L'autonomie des parties est liée à un certain délai et est soumise à la règle prévoyent que chacun des arbitres et le président doivent être d'une nationalité neutre.

Les comités nationaux des différents pays contribuent au travail de la cour d'arbitrage de la CCI, ceux-là pouvant proposer des arbitres non seulement en present en considération leur neutralité, mais aussi leurs rapports avec les parties.

La Cour arbitrale de la CCI a adopté, au sujet du *droit à appliquer,* l'article 7. de la Convention européenne et conformément à cela, en vertu de l'article 13, paragraphés 3 et 5. du Réglement de la Cour d'arbitrage de la CCI, les parties sont libres de déterminer le droit devant être appliqué, et faute d'accord entre les parties, le tribunal applique le droit qu'il juge appropriée en l'espéce. Même en vertu de l'article 12 du Réglement de la Cour d'arbitrage hongroise, il faut prendre en considération les stipulations du contrat et les usages et coutumes commerciaux.

Le tribunal arbitral décide à la majorité des voix. A défaut de majorité, le *président statue* seul.

La cour d'arbitrage de la CCI ne peut intervenir dans la décision que pour les questions de forme et non pas au fond. Ainsi par exemple elle peut attirer l'attention du tribunal sur le fait qu'il ne peut statuer ultra petitu et ne peut adjuger un intérêt moratoire, si la partie demanderesse ne l' a pas demandé.

Certaines réformes de la Cour d'arbitrage de la CCI ont été nécessitées par suite de l'augmentation du nombre cas (annuellement 300). En 1980, un réglement interne de la Cour arbitrale a été élaborée, celle-ci déférant certains droits de la Cour d'arbitrage de la CCI à une *commission* de trois membres (un président et deux membres) composée de ses propres membres. À l'avis de la commission les cas les plus compliqués, à l'avenir aussi, seront du ressort du plénum. La commission se réunit deux fois par mois et son activité contribue largement à accélerer le déroulement des cas.

Le *tarif des frais* a été modifié et est plus avantageux. La partie demanderesse doit déposer une provision de 500 dollars, lors de l'introduction de son action et cette somme ne lui est pas remboursée, dans la cas où l'affaire est retirée avant la remise du dossier au tribunal arbitral.

Mais dans ce cas-ci d'autres frais ne sont pas prescrits. Si l'affaire n'est pas retirée et que la procédure suit son cours, les 500 dollars mentionnés seront imputés sur les frais.

En ce qui concerne les réformes il faut aussi mentionner que la Cour d'arbitrage ne siége a précédemment qu' à Paris, bien que les parties demanderesses de n'importe quel pays aient eu la possibilité de s'y adresser. Ainsi au cas où la procédure ne se déroulait pas à Paris des difficultés techniques se présentaient (salle d'audience procès verbal, etc.) Selon l'une des mesures prévues par la réforme, de différents centres seraient désignées à l'intention des cours d'arbitrage. Un tel centre fonctionne dès maintenant à Séoul (Corée du Sud) et un autre fonctionnera sous peu à Londres. On prépare également l'établissement d'une Cour à New York, des autres en Amérique Latine et au Moyen-Orient. Tout ceci bien entendu assure aux parties le droit de choisir librement le lieu de la procédure.[20]

9. Le fonctionnement des Cours d'arbitrage instituées auprès des chambres de commerce des Etats-membres du CAEM est d'une importance similaire, naturellement surtout pour les organisations fonctionnant dans les Etats-membres du CAEM. Lorsqu'on compare les réglements respectifs, on peut constater une grande similitude entre les Réglements mongols, polonais, soviétiques et hongrois, tandis que certaines différences apparaissent dans les Réglements de la RDA, de la Roumanie et de la Bulgarie.[21] Ainsi donc les Cours d'arbitrage des chambres de commerce sont devenues des cours d'arbitrage uniformes internationales dans le domaine du commerce extérieur.

Il faut également mentionner que le tribunal arbitral n'examinera que ce qui est *exposé par les parties*. Les faits non exposés, des demandes de preuve non soumises ne peuvent être examinées par le tribunal arbitral.[22]

Le droit des parties à être entendues est assuré par de nombreuses dispositions de règlements des différentes chambres de commerce ainsi que par les réglements uniformes.

La personne du représentant n'est nullement limitée, le représentant peut être aussi bien être un avocat étranger, un avocat-conseil ou n'importe quelle autre personne.

La procédure *n'est liée à aucune formalité*. Selon la pratique l'action peut être introduite par télégramme ou telex.

Le Professeur Stalev a soulevé une question fort intéressante au séminaire. Est-il nécessaire de demander, aux termes de la Convention de New York dans un Etat occidental une procedure d'exequatur pour l'exécution de la sentence d'une cour d'arbitrage de la chambre de commerce fonctionnant dans les Etats-membres du CAEM. A ce sujet, le rapporteur a donné une réponse négative expliquant dans le détail son avis.[23]

Les participants au séminaire ont estimé au sujet des cours arbitrales permanentes existant dans les pays socialistes, que l'intervention est également problématique.[24] Cette question nécessite donc une solution à l'avenir.

Le tribunal arbitral saisi décide à la majorité des voix. Le problème de *l'opinion* du juge mis en minorité n'est pas réglementé de manière uniforme dans les Etats-membres du CAEM.[25]

En général, il est nécessaire d'accompagner la sentence de ses motifs. Seule la loi tchécoslovaque de 1963 sur l'arbitrage (non pas le réglement de la cour d'arbitrage) permet d'omettre les motifs, en cas d'un commun accord des parties.

[20] STALEV, J.: (président de la cour d'arbitrage instituée auprès la Chambre de Commerce Bulgare): *Solution des litiges maissant des relations économiques internationales: procédure appliquée par les cours d'arbitrage fonctionnant auprès des chambres de commerce des Etats membres du CAEM.* Rapport fait au séminaire.

[22] STALEV, op. cit.

[23] STALEV, op. cit.

[24] RÉVAI, op. cit. (n. 18.)

[25] HANÁK, Sv. *Sentences arbitrales dans le système juridique des pays socialistes.* Rapport fait au séminaire.

Les cours d'arbitrage des chambres de commerce des Etats-membres du CAEM statuent sur la base des *lois*.

La loi tchécoslovaque de 1963 sur l'arbitrage, le code de procédure civile polonais, le décret du gouvernement de 1975 de la RDA sur l'arbitrage permettent *l'invalidation* de la sentence arbitral, cependant cette possibilité ne figure pas dans les Réglements des cours d'arbitrage respectives. En Hongrie l'invalidation ne peut avoir lieu que dans le cas d'un arbitrage *ad hoc*, pour les sentences de la cour l'arbitrage de la chambre de commerce, il n'y a aucune possibilité de recours.[26]

Nous avons déjà mentionné à ce sujet les lacunes juridiques existant dans les réglementats et seul le réglement roumain fait exception, qui de manière particulière assure la possibilité d'une action en recours ou même de requête civile extraordinaire.[27] À ce sujet on peut mentionner qu'il est possible de se pourvoir en appel contre la sentence de la *cour d'arbitrage maritime*, cour d'arbitrage spécialisée fonctionnant à Moscou, auprès du Tribunal Suprême de l'Union Soviétique.

10. En ce qui précéde, nous avons traité surtout les question relatives aux Cours d'arbitrage permanentes des pays socialistes. Si nous examinons ce qui se passe au-délà de nos frontières, nous constatons que dans les pays occidentaux les parties exécutent de leur gré la sentence arbitrale et ceci non seulement en ce qui concerne la Cour d'arbitrage de la CCI mais aussi en général et même s'il existe des possibilités de recours, les parties s'y renoncent dans la convention ou la clause d'arbitrage.[28] On peut constater, que les tribunaux interprètent dans la pratique de manière restrictive les causes de refus visée à l'article V. de la Convention de New York ratifiée dans notre pays par le décret-loi n° 25 de 1962.

La validité d'une sentence d'arbitrale doit être jugée selon le droit du pays où la sentence a été prononcée. Donc le tribunal du pays chargé de l'exécution ne peut l'annuler, bien que se pose, même ici, le problème visé l'article V paragraphe 2 de la Convention de New York, notemment que l'objet du litige n'est pas susceptable d'être réglé par la voie d'arbitrage dans le pays où l'execution est demandée, ou que la reconnaissance et l'exécution est contraire à *l'ordre public*. Voici une notion qui a été largement discutée au séminaire. La théorie établit une différence entre l'ordre public (interne du pays) «sensu lato» et (international) «sensu stricto.» Selon cette théorie il n'est porté atteinte à l'ordre public international d'un pays quelconque, que si la sentence arbitrale étrangère dont la reconnaissance et l'exécution est demandée n'est pas en accord avec les fondements de l'ordre légal intérieur ou avec le sens de la justice.[29]

Un rapporteur du séminaire analysant les systèmes juridiques étrangers en a déduit que les sentences étrangères aient priorité sur les sentences du pays.[30]

Au sujet de la Convention de New York les participants au séminaire ont a souligné qu'elle n'est valable que pour les sentences et non pas pour les arrêts et accords arbitraux. C'est pourquoi la cour d'arbitrage de la CCI rend ces sentences sur la base de l'accord entre les parties.

Ce n'est qu'exceptionnellement qu'il est possible de faire un *recours régulier* en cas de sentence arbitrale, ainsi par exemple en France, on peut faire appel contre une sentence arbitrale. Cependant dans la plupart des cas les parties y renoncent lors de la stipulation relative à la cour d'arbitrage.

[26] C'est dans ce sens qu'il faut compléter le rapport cité du HANÁK.

[27] RÉVAI. op. cit. (n. 18.)

[28] MELIS, W.: *Conditions de la validité et de la reconnaissance des sentences arbitrales étrangères.* Rapport fait au séminaire.

[29] SCHWAB, K. H.: *Schiedgerichtsbarkeit*, München pp. 225. seq.

[30] MELIS, op. cit.

Par contre dans les différents pays, il existe une large variété de *recours extraordinaires* avec des délais plus ou moins long, allant même jusqu'à 10 ans. Ceci toutefois n'empêche pas la reconnaissance et l'exécution selon la'convention de New York.

Le séminaire a constaté que cet accord a grandement contribué au développement de la pratique de l'arbitrage.

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Pour tirer les conclusions des débats du séminaire, outre les questions relatives à la convergence de la situation respective à l'Est et à l'Ouest, on peut indiquer ce qui suit.

a) Au point de vue de la forme, nous devons souligner le *déroulement parfait* du séminaire, sa direction exemplaïre, l'excellente *traduction simultanée* en plusieurs langues des conférences et interventions à l'intention des participants, ainsi que la distribution des textes en différentes langues.

b) En ce qui concerne le fond nous devons souligner le *niveau élevé* des conférences, la richesse des connaissances scientifiques et pratiques. Ceci est également valable pour les interventions sur lesquelles nous ne pouvons nous étendre par manque de place.

c) Le séminaire a *élargi* les connaissances des participants, attirant l'attention des personnes présentes sur des faits et constatations ignorées auparavant.

d) L'arbitrage entre pays de l'Est et de l'Ouest est devenu une institution plus populaire et le séminaire a contribué à *développer la coopération économique, scientifique et technique* entre Etats de systèmes sociaux différents. Nous devons également mentionner que parmi les cours d'arbitrage des Etats-membres du CAEM, celle de notre pays permet aux parties étrangères (donc ressortissantes des pays occidentaux) le choix d'un *arbitre étranger* en cas de réciprocité. De même il est aussi possible — bien que la procédure soit compliquée — selon le règlement tchécoslovaque aussi, d'inscrire l'arbitre étranger sur la liste des arbitres.

e) L'établissement, le développement et la renouveau de liens amicaux, professionnels ont également donné une importance non négligeable à ce séminaire.

f) Pour terminer nous devons mentionner que le séminaire reflète la coopération des juristes de systèmes sociaux différents, dans un esprit de coexistence pacifique.[31] En fait il serait souhaitable que dans la situation politique actuelle tendue les personnalités politiques procèdent dans le même esprit.

Vu ce succès il serait opportun d'organiser régulièrement de tels séminaires. Ce souhait justifié est fondé sur les manifestations précédentes.

T. Révai

[31] Mentionné par RÉVAI, T. dans son intervention faite dans la phase finale du séminaire.

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Recensiones

PÓLAY, E.: Die Pandektistik und ihre Wirkung auf die Wissenschaft des ungarischen Privatrechts*

I

Es ist kaum nötig die Bedeutung des Themas, das zu analysieren sich E. Pólay zum Ziel gesetzt hat, besonders zu betonen. Die Pandektistik ist ein besonders wichtiger Teil der sogenannten neuzeitlichen Privatrechtsgeschichte. Diese auf das privatrechtliche Denken über zahlreiche Transmissionen auch heute noch wirkende Richtung knüpft sich nicht bloß an die universelle Zivilrechtswissenschaft, sondern auch an die Romanistik. Die katexochen Rolle dieser Anknüpfung bestätigt jene Tatsache, daß sich — wie das der Verfasser in der Einleitung seines Werkes betont — die Terminologie, ja in vereinzelten Fällen sogar auch einzelne theoretische Thesen der Pandektistik in der modernen Zivilistik eingebürgert haben. Die hier rezensierte Arbeit befaßt sich mit der geschichtlichen Grundlage der Entstehung und dem Verlauf dieser wissenschaftlichen Richtung, sowie mit ihrem Abschluß in Deutschland, ferner mit derer Wirkung auf die ungarische Rechtswissenschaft aufgrund der zeitgenössischen Literatur, teils der ungarischen Rechtsliteratur des zwanzigsten Jahrhunderts. Sie ist auf diese Weise in erster Linie eine wissenschaftsgeschichtliche Arbeit. Pólay strebt eine umfassende und komplexe Analyse der Pandektistik an. Aus diesem Grund untersucht er nicht nur die Gestaltung des „Schicksals" eines gegebenen Rechtsinstituts. Daran liegt es auch, daß er die Pandektistik nicht lediglich durch die Vorstellung einer hervorragenden Figur der Pandektistik — wie z. B. Erik Wolf — charakterisiert. Diese im Grunde wissenschaftsgeschichtliche Annäherung vermengt aber in ihren konkreten Elementen — paradoxerweise in geglückter Form — die Institution- oder dogmengeschichtliche Anschauungsweise mit der Vorstellung einiger bedeutenden Vertreter dieser Richtung. Daraus folgt, daß die Schlußfolgerungen im Werk von der Beurteilung der an bestimmte Rechtsinstitutionen knüpfenden theoretischen Thesen der einzelnen Pandektisten abhängig sind. Danach folgt die wissenschaftsgeschichtliche Wertung der gegebenen Rechtsgelehrten, oder die Zusammenfassung der Eigenheiten und Charakteristika der durch sie vertretenen Richtung.

II

2. Im ersten, sich mit dem Begriff der Pandektistik befassenden Kapitel untersucht der Verfasser die Tätigkeit der Glossatoren und der Kommentatoren, die Frage der deutschen Rezeption, den Begriff des deutschen Pandektenrechts und schließlich die allgemeinen begrifflichen Merkmale der Pandektistik. Von der Tätigkeit der Glossatoren sprechend stellt er fest, daß deren Inhalt bloß zum Teil privatrechtlichen Charakters ist. Die öffentlichrechtliche, ideologische Grundlage des auch im Investiturkrieg prägnant zum Ausdruck kommenden Gegensatzes zwischen dem Kaisertum und dem Papsttum wurde eben von den ghibellinisch eingestellten Glossatoren geschaffen. Irnerius und seine Nachfolger formen im Wege der Weiterentwicklung ein-

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zelner Teile der justinianischen Kodifikation, und innerhalb deren vor allem der Pandekten; durch ihre exegetische Methode ein Rechtsmaterial heraus, das zwar in sich und technisch nicht als Pandektenrecht aufgefaßt werden kann, doch wird — über mehrseitige Vermittlung — zu einer seiner Grundlagen. Die Tätigkeit der Kommentatoren, oder anders der Postglossatoren, steht bereits in enger Verbindung mit der Praxis.

Die entscheidende Wirkung der Kommentatoren-Schule auf die Rechtsentwicklung des Kontinents wird durch das Eindringen der Kommentatoren auf deutsches Gebiet ausgeübt. Die verwickelten Fragen der Rezeption des römischen Rechts in Deutschland analysierend gelangt der Verfasser zu der Folgerung, daß es nicht an einen Akt, an die Gerichtsordnung des Reichskammergerichts gebunden werden kann. Der Ausdruck „Rezeption" bedeutet der richtigen Auslegung nach keinerlei „Kulturokkupation", er ist vielmehr — in deutscher Relation zumindest — ein einer gewissen „Verwissenschaftlichung des Rechts" adäquater Begriff, der weder an die erwähnte Gerichtsordnung, noch an die unklaren Bestimmungen der Legenden des Lothars des Ersten gebunden werden kann.

Die Rezeption beschränkte sich aber nicht auf das Material des römischen Rechts, sondern erstreckte sich auch auf die „Einverleibung" des Kanonischen Rechts und des Langobardischen Lehnsrechts. So entsteht das ius commune = gemeines Recht, als ein sich auf das öffentliche Recht und Privatrecht beziehendes, dem Landesrecht entgegengesetztes, mit diesem konkurrierendes Rechtsmaterial. Die Harmonie zwischen diesem ius commune, und den örtlichen Partikularrechten, d. h. die Aufgabe der Adaptierung des ius commune zu den „örtlichen" Verhältnissen wird durch die sogenannten Praktiker durchgeführt. Die kameralistische Richtung im Titel und im Inhalt am besten repräsentierendes Werk ist der „Usus modernus Pandectarum" von der Wende des XVII. und XVIII. Jahrhunderts von Samuel Stryk. Zwar ist für die Praktiker einerseits die zu starke Orientierung auf die deutsche Praxis — was die Trennung von den ursprünglichen römischen Quellen mit sich bringt —, andererseits die kasuistische Untersuchungsmethode kennzeichnend, kann von einer „Pandektenwissenschaft", zeitlich als erstes, im Zusammenhang mit den deutschen Kameralisten gesprochen werden. Der sich an diese Richtung knüpfende Ausdruck „Pandektenwissenschaft" ist trotzdem richtig, daß die Richtung selbst — haupsächlich wegen der immer mehr die Vorherrschaft gewinnenden partikularen Anschauungsweise — zur Weiterentwicklung unfähig ist. Allein das im XVII. Jahrhundert aufblühende Naturrecht wäre zur Weiterentwicklung dieses unfruchtbaren, durch die Praktikern gepflogenen „Pandektenwissenschaft" fähig. Die Vermengung der „Pandektenwissenschaft" und des Naturrechts tritt aber nicht ein, was einerseits auf die öffentlichrechtliche Anschauungsweise des Naturrechts, andererseits aber auf die hauptsächlich philosophische — also nicht rechtliche — Einstellung der Naturrechtsprofessoren zurückzuführen ist, — wie das durch das Beispiel des sich vor allem mit Moralphilosophie befassenden Christian Wolf bewiesen wird.

3. In dem sich mit der Entstehung, Entwicklung und Rückfall befassenden Kapitel analysiert E. Pólay vorerst die gesellschaftlichen und politischen Gründe der Pandektistik. Er stellt fest, daß diese Richtung durch die Ende des XVIII. Jahrhunderts von dem berühmten Göttinger Rechtslehrer, Gustav Hugo gegründete historische Schule ins Leben gerufen wurde. Tatsächlich aber knüpft sich der Anfang der Entstehung der Pandektistik an das in 1803 veröffentlichte, seinen Verfasser von einem Tag auf den anderen in Europa weit zum berühmten Wissenschaftler machende Werk Savignys „Das Recht des Besitzes". Die Entstehung der sich an die historische Schule knüpfenden Pandektistik wurde durch die im XVIII. und XIX. Jahrhundert in Deutschland herrschenden wirtschaftlichen, politischen und geistigen Faktoren ermöglicht. Unter der geistigen Richtungen muß der mit dem Vernunftsrecht auf radikale Weise abtuenden Philosophie Immanuel Kants, sowie die Geschichtsphilosophie Herders eine besondere Rolle zuerkannt werden. Nicht

unbedeutend ist in diesem Bereich die aus dem „Neuhumanismus" herauswachsende klassische Philologie, deren Ergebnis die Textkritik von Niebuhr ist. Auf dem Gebiet der rechtlichen Faktoren ist vor allem die Abrechnung mit dem sich bereits als veraltet erweisenden Philosophie des Naturrechts von entscheidender Wichtigkeit. Die Entwicklungsgeschichte der Pandektistik untersuchend gelangt Pólay zu dem Schluß, daß innerhalb dessen drei Epochen unterschieden werden können. Der Anfang und der Abschluß der ersten Periode ist durch die Publikation der Werke Savignys „Das Recht des Besitzes" (1803), bzw. „Obligationenrecht" (1853) gekennzeichnet. Die zweite Epoche — die Epoche der Differenzierung — dauert von 1863 bis zur Inkraftsetzung des BGB. Die dritte Periode — die Periode des Rückfalls — beginnt mit dem Jahr 1900 und kann auch noch in der bourgeoisen Privatwissenschaft unsrer Tage nachgewiesen werden.

In dem sich mit der Epoche der Entfaltung der Pandektistik beschäftigenden Teil des Werkes befaßt sich der Autor mit der umfassenden Beurteilung der Tätigkeit Savignys und Puchtas. Er betont, daß Savigny — im Wesentlichen bereits durch sein seitens Kantorowicz als „Begriffsdichtung" apostrophiertes Werk „Das Recht des Besitzes" — der historischen Schule einen romanistischen Charakter verliehen hat. Innerhalb der Schule meldet sich aber frühzeitig der germanistische Zweig, die germanistische Richtung, siehe auch das eine große Wirkung ausübende, in 1808 publizierte Werk „Deutsche Staats- und Rechtsgeschichte" von Eichhorn. Als dessen Ergebnis trennen sich die beiden Zweige recht bald voneinander. Der Bruch geht aber erst Jahrzehnte später, im wesentlichen zum Beginn der 1840er Jahre vor sich. Auch innerhalb der romanistischen Richtung tritt die Differenzierung auf, und zwar derweise, daß sich neben der Pandektistik allmählich die römische Rechtsgeschichte zu entfalten beginnt. Die römische Rechtsgeschichte wird erst ab Mitte des Jahrhunderts, hauptsächlich als Ergebnis der mächtigen literarischen Tätigkeit Mommsens, selbständig. Die römische rechtsgeschichtliche Richtung, deren wesentlichere Vertreter Angelo Mais, Rudorff, Bluhme, Dirksen und Schoell sind, analysiert die Quellen des römischen Rechts nicht auf dogmatischer Basis. Das Verhältnis zur rechtlichen Dogmatik bietet die effektive Zäsur zwischen der sich auf die Pandekten stützenden Pandektistik und der römischen rechtsgeschichtlichen Richtung.

Die Rolle und Bedeutung Savignys darlegend, untersucht E. Pólay vorerst die geschichtlichen Vorläufer und Eigenheiten der sich auf Systembildung richtenden Bestrebungen dieses Rechtswissenschaftlers. Im Mittelpunkt des großen Rechtsgelehrten steht die Analyse einzelner Institutionen des römischen Rechts. Das römische Recht bedeutet für ihn die Grundlage, von welcher ausgegangen er die umfassende Reform des Privatrechtswissenschaft seiner Zeit beginnen kann. Ein unabsprechbares Verdienst Savignys ist die Erkenntnis der „historischen Trennung", die die Basis seiner historischen Denkart bildet. Seine Zeitgenossen — so auch Anselm Feuerbach — nehmen auf diesen Umstand keine Rücksicht, dessen Ergebnis eine anakronistische Anschauungsweise des römischen Rechts ist. Nur zum Teil vermindert den Wert der zur Erschließung der Institutionen des römischen Rechts gerichteten Forschungen Savignys, daß er im Grunde nur die Erschließung des justinianischen Rechts befleißigt, infolgedessen die Gesichtspunkte der Interpolationenforschung völlig verschwinden. Die bereits zwei Jahrhunderte früher erschlossenen Interpolationen — die Interpolationenforschung ist mit dem Namen des Franzosen Antoine Faure verknüpft — sind für Savigny selbstredend nicht unbekannt. Die Abweisung, oder genauer die Ignorierung stammt aller Wahrscheinlichkeit nach aus der Anerkennung des römischen Rechts als positivrechtliches Rechtssystem. Zu den paradoxen Erscheinungen des Lebenswerkes von Savigny gehört die Forschung der justinianischen Kodifikation. Auch noch in dem, in der letzten Periode seines Lebens geschriebenen „System" nimmt er das Recht der Pandekten, also das kodifizierte Recht, und nicht das „gemeine Recht" zum Maßstab der modernen Privatrechtswissenschaft. In seiner als Einleitung zu seiner

„Geschichte des römischen Rechts im Mittelalter" gedachten „Streitschrift" mit dem Titel „Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft" erachtet Savigny die justinianische Kodifikation als ein Produkt eines im Verfall befindlichen Reiches, was gleichzeitig ein Beweis seines die Kodifikation verneinenden Standpunktes ist. Der Widerspruch kann nur dadurch behoben werden, daß wir beachten, daß für den Rechtsgelehrten die justinianische Kodifikation nur als Mittel der Orientierung in dem gewaltigen Material des römischen Rechts einen Wert darstellt. Die hervorragende Bedeutung des Lebenswerkes von Savigny besteht darin, daß er die Einheit der Rechtsgeschichte und der Dogmatik schuf.

Die Einheit der Rechtsgeschichte und der rechtlichen Dogmatik ist auch für das Lebenswerk Puchtas kennzeichnend. Es ist wieder eine andere Frage, daß er — abweichend von Savigny — die von Kant stammende philosophische Kategorie des selbständigen Seins des Rechts verwendend, den sogenannten wissenschaftlichen Formalismus gründet, dessen Folge die sogenannte „Begriffsjurisprudenz" ist. Puchtas par excellence „theoretische" Einstellung spiegelt sich in seinem Werk „Cursus der Institutionen" wider, in dessen philosophische Einleitung — Pólays treffender Feststellung zufolge — das „preußische Naturrecht" erkennbar ist. In dem axiomatischen System Puchtas — betont der Verfasser — existiert das Recht unabhängig von den Individuen, in dem hierarchisch aufgebauten Begriffssystem geht es dem Begriff des Rechtsverhältnisses unbedingt voran. Als Folge dieser Denkart trennt sich Puchta von der wirtschaftlich-gesellschaftlichen Wirklichkeit und wird zur führenden Person der leblosen, zwar „systematisch klaren" Begriffsjurisprudenz.

Nach der Erörterung der Tätigkeit Puchtas und Savignys stellt Pólay fest, daß von den beiden die Anschauung Savignys für progressiver gilt. Die „Volksgeist"-Theorie Savignys, als zentraler Teil der allgemeinen Theorie des Rechtsentstehung, ist progressiver, der gesellschaftlichen Wirklichkeit mehr adäquat, als die eindeutig konservativere Konzeption Puchtas.

4. In der Einleitung des sich mit der Differenzierung der Pandektistik befassenden Abschnitts hebt der Verfasser hervor, daß auch die Charakteristika des germanistischen Zweiges durch den romanistischen Zweig determiniert sind. Nach dem Muster des „heutigen römischen Rechts" fordern auch die Germanisten ein „deutsches Privatrecht der Gegenwart". Daneben beeinflußen das Pandektensystem und die „Konstruktions"- bzw. „Begriffsjurisprudenz" auch diesen Zweig. Der auf der ideologischen Ebene des Hegel'schen objektiven Idealismus stehende Georg Baseler wendet sich Mitte des vorigen Jahrhunderts offen von Savigny und seinen romanistischen und germanistischen Anhängern ab. Die auf der Hegel'schen Basis stehenden Rechtswissenschaftler aus Kiel wünschen, als Folge ihrer Bestrebung zur Schaffung eines BGB, hinsichtlich der Rechtswissenschaft, deren philosophischen — siehe mutatis mutandis die enge Verbindung der Naturrechtswissenschaftler mit der Philosophie — aktuellen politischen sowie sozialen Aufgaben Aufmerksamkeit zu schenken. In den weiteren weist E. Pólay darauf hin, daß innerhalb des romanistischen Zweiges die römische Rechtsgeschichte gutes halbes Jahrhundert hindurch eine Art „Nebenprodukt" ist. Zwar sind die Zeichen der römischen rechtsgeschichtlichen Richtung bereits bei Savigny nachweisbar, jedoch beginnt sie erst mit der Tätigkeit Mommsens selbständig zu werden.

Über die dogmatische Richtung der Pandektistik sprechend befaßt sich der Verfasser mit der Tätigkeit von Arndts, Brinz, Windscheid und Dernburg ausführlicher. Die Bedeutung und die Eigenheiten der dogmatischen Richtung umfassend beurteilend hebt Pólay das unbedingte Beharran auf der Begriffsjurisprudenz hervor. Eine Folge dessen ist, daß dem Rechtsverhältnis gegenüber die Rechtsnorm in den Vordergrund tritt. Die Jurisprudenz Puchtas wird durch die Betonung des Primats des positiven Rechts, sowie die Modifizierung des Rechtsverhältnisbegriffs aufgehoben. Die auf dem Boden des Liberalkapitalismus entstandene dogmatische Rechtswissenschaft entsprach im Wesentlichen den zur Zeit ihrer Entstehung existenten Verhältnissen. Zur Zeit des Mono-

polkapitalismus trennt sie sich aber schon von den sozialen Beziehungen des Rechts, und dieser Umstand macht diese Richtung überholt.

Die als das „caput et finis" der Interessenjurisprudenz zu betrachtende Tätigkeit Jherings analysierend weist Pólay auf die die Anschauungsweise des großen Göttingener Rechtsgelehrten formenden philosophischen und rechtstheoretischen Meinungen hin. Hinsichtlich der Betrachtungsweise Jherings war die Hegel'sche Philosophie, ferner der Utilitarismus Benthams und Austins, sowie Comtes positivistische Philosophie von entscheidender Wirkung. Die Wirkung Darwins und Stirners kann schon wesentlich schwieriger nachgewiesen werden. Wir halten jene Behauptung nicht unbegründet, das Jhering gerade deshalb keine Nachfolger hatte, weil seine allgemeine Privatrechtstheorie von bestimmten philosophischen und rechtsphilosophischen Konzeptionen entstand. Eine Folge dessen ist auch, daß die Tübingener Schule die dem großen Meister folgend, die Interessenjurisprudenz theoretisch begründete, nicht mehr zur Pandektistik gehört. Von den Pandektisten ist Jhering der erste, der den Zusammenhang zwischen Recht und Gesellschaft mit Nachdruck betont. Seine Trennung von der Volksgeisttheorie ist aber schon fast eine Kriegserklärung der allgemeinen privatrechtstheoretischen Konzeption der historischen Schule. Die konstruktive Kritik der Besitzlehre von Savigny, wodurch die für die Kodifikation so wichtige Besitzlehre im Bereiche des Privatrechts auf eine neue Grundlage gestellt wird, ist auch von großer Bedeutung. In der Frage der Haftung ist seine Konzeption weitaus nicht so bahnbrechend. Er wirft zwar den Anspruch auf die objektive Verantwortlichkeit auf, geht aber nicht über die Konzeption der subjektiven Verantwortlichkeit der dogmatischen Richtung hinaus. Die Größe Jherings besteht grundlegend darin, daß seine Konstruktionen hinsichtlich der einzelnen Rechtsinstitutionen den effektiven Ansprüchen seines Zeitalters — der monopolkapitalistischen Periode — entsprechende Antwort geben.

5. In dem den Niedergang der Pandektistik behandelnden Teil erschließt der Verfasser jene wirtschaftlich-gesellschaftlichen Bedingungen, die das Ansterben der Pandektistik verursachten. Den entscheidenden, letzten Schlag für die Pandektistik bedeutet die Inkraftsetzung des BGB, obzwar die Thesen und Konzeptionen der Pandektistik in den Paragraphen des BGB inhaltlich — hauptsächlich infolge der Zugrundelegung des Lehrbuchs von Windscheid — weiterleben und weiter wirken. Die sich konkretisierenden Kodifikationsversuche führen zur Belebung der römischen rechtsgeschichtlichen Forschungen, das in der Interpolationsforschung, in der Untersuchung der sogenannten Volksrechte (Mitteis) und in der nach Wenger auflebenden vergleichenden antiken Rechtsgeschichte Form gewinnt.

6. In dem Teil, der die Wirkung der Pandektistik auf die Wissenschaft des ungarischen Privatrechts zum Thema hat, untersucht E. Pólay die ungarische Zivilrechtswissenschaft in der Anfangsperiode der Entfaltung der Pandektistik. Dem Verfasser zufolge ist die ungarische Rechtswissenschaft vom Anfang des XVIII. Jahrhunderts bis zum Reformzeitalter um 1820—30 durch Werbőczys Tripartitum determiniert. Diese Determiniertheit meldet sich ebenso in inhaltlicher Beziehung, als in Bezug auf das sogenannte Institutionssystem. Die einzige Änderung ist, daß die naturrechtliche öffentlichrechtliche Konzeption, von Samuel Pufendorf und Christian Wolf durch die Vermittlung von Martini in Ungarn eingebürgert wurde. Auf dem Gebiet des Privatrechts existiert als theorieformender Faktor ausschließlich die sogenannte „denaturierte" — d. h. ihres progressiven öffentlichrechtlichen Inhalts völlig entledigte — Kantsche Privatrechtsphilosophie.

Die historische Schule hat nach der Beurteilung des Verfassers zu diesem Zeitabschnitt in Ungarn keinen Einfluß, dessen Grund auch darin zu suchen ist, daß die ungarischen Rechtswissenschaftler in der untersuchten Periode mit der deutschen Rechtswissenschaft nicht in Berührung gelangen. Weder Imre Kelemen, noch in vieler Beziehung sein Nachfolger, Pál Szlemenics, können als Vorläufer

der historischen Schule in Ungarn betrachtet werden. Die Trennung von dem Institutionssystem — unter anderen in Szlemenics's „Elementa juris Hungarici civilis privati", ein Werk von zwei Bänden — akzeptiert Pólay nicht als entscheidendes Argument dafür, daß er sich der geschichtlichen Schule angeschlossen hätte. Er weist mit Recht darauf hin, daß die Aufteilung des Abschnittes „de rebus" in Sachenrecht und Obligationsrecht nur in der ungarischen Rechtswissenschaft eine Neuigkeit ist.

7. Sich mit der in der ungarischen Literatur viel umstrittenen Frage befassend, ob nämlich die frühe Pandektistik im ungarischen Reformzeitalter wirkte, oder nicht, analysiert Pólay die Tätigkeit von Ignác Frank. Der Verfasser ist der Meinung, daß Frank nicht als Befolger der historischen Schule betrachtet werden kann. Jene Erscheinungen, die — wie es hauptsächlich Pauler behauptete — darauf hinweisen würden, sind nicht durchschlagend. Der Umstand, daß Frank die Kodifikation für ein „sich der natürlichen Entwicklung des Rechts widersetzendes kühnes Experiment" erachtet (Pauler), kann noch mit der die Kodifikation a limine abweisenden Stellungnahme der historischen Schule nicht gleichgestellt werden. Ein gleichfalls schwaches Argument ist es aus dem Bruch mit der Hegel'schen Philosophie auf den Anschluß zur historischen Schule zu folgern. Das römische Recht, welches bei den Vertretern der historischen Schule eine Legitimationsgrundlage bildet, ist in den Werken von Ignác Frank von sekundärer Bedeutung. Bei Frank ist die Pandektistik ausschließlich nur in seiner Besitzlehre und — eventuell — in seiner Konzeption bezüglich des Wesens der Rechtsperson richtunggebend. Frank spielte, als Bearbeiter des feudalen heimischen Rechts, eine hervorragende Rolle. Seine auf keine feste systematische Basis bauende „geschichtliche" Anschauungsweise — worüber der Verfasser treffend bemerkt, daß es bereits in seiner Vernunftsrechts-Periode zur Geltung kommt — entstammt den Eigenheiten des ius patrium, und nicht dem Anschluß an die historische Schule.

8. In dem sich mit der einheimischen Wirkung der frühen Pandektistik befassenden Teil weist der Verfasser vorerst auf jene „Kanäle" hin, durch die diese Richtung in die ungarische Privatrechtswissenschaft „einsikkern" konnte. Neben den ungarischen Pandektenwerke fällt dem — das Pandektenkollegium im Universitätslehrgang obligatorisch machenden — von Thun-Hohenstein Lehrplan, der an Unger's Namen knüpfenden „Rezeption" der Pandektistik in Österreich, sowie dem Sächsischen Zivilgesetzbuch vom Jahre 1863 eine wichtige Rolle zu. Infolge der Rückständigkeit der heimischen bürgerlichen Entwicklung erlangen aber bloß einzelne Elemente der Pandektistik, so insbesondere die allgemeinen Grundinstitutionen des Privatrechts, in der heimischen Rechtswissenschaft Bürgerrecht. Pál Hoffmann ist der erste, in dessen Werke die Lehren der historischen Schule — ganz besonders die konservative Rechtsentstehungstheorie — ohne Modifizierung erscheinen. Es muß zugegeben werden — und das ist auch unsere Meinung — daß die Doktrinen Hoffmanns isoliert geblieben sind, trotzdem würden sie, wegen ihrer Bedeutung und ihres bahnbrechenden Charakters, verdienen, mit größerer Betonung hervorgehoben zu werden. Ein Verdienst Hoffmanns ist auch, daß er aus dem Urquelle schöpft, im Gegensatz zum Beispiel zu Suhayjda, der seine Doktrinen dem Sächsischen Zivilgesetzbuch entnimmt.

9. Die Wirkung der dogmatischen Richtung auf die ungarische Rechtswissenschaft analysierend spricht Pólay von der Tätigkeit von Imre Zlinszky und Mihály Herczeg. Der Verfasser gelangt zur Folgerung, daß die theoretische Tätigkeit von Zlinszky und Herczeg in vielfacher Hinsicht die Weiterentwicklung der Thesen Savignys und Puchtas — zwar hauptsächlich nach Windscheid — darstellt. Für ihre Doktrinen ist es unter anderen die kräftige Zurückdrängung der Rolle des Willens, die Verwerfung der Fiktionstheorie bezüglich des Wesens der Rechtsperson, ja in einzelnen Fällen — so in der Auslegung der Rechtsnormen — sogar die Schaffung einer neuen Doktrin charakteristisch. Ihr Verdienst

ist die planmäßige, auf einer umfassenden Konzeption ruhende „Rezeption" der Pandektistik in die ungarische Privatrechtstheorie, das Jahrzehnte hindurch für die heimische Rechtswissenschaft als Wegweiser diente.

10. In dem Teil des Werkes, in welchem E. Pólay die Wirkung der Interessenjurisprudenz auf die ungarische Rechtswissenschaft bespricht, befaßt er sich mit der Tätigkeit von Gusztáv Szászy-Schwarz, dem „ungarischen Jhering". Das Lebenswerk von Szászy-Schwarz knüpft sich in seinen Hauptzügen an die durch Jhering vertretene Interessenjurisprudenz. Die Doktrinen seines Göttingener Meisters entwickelt er in mancher Hinsicht weiter. Sein Anschluß an die Interessenjurisprudenz erschöpft sich nicht in der fulminanten Kritik der Rechtsentstehungstheorie der historischen Schule. Er hat sogar bezüglich der Anerkennung der Rolle des Gewohnheitsrechts eine realistischere Anschauung, als Jhering. Sein großes Verdienst ist die tiefgehende Kritik des nicht auf einheitlicher Basis ruhenden Pandektensystems. Ein Produkt seiner Bestrebungen zur „praktischeren" Wissenschaft ist unter anderen die Objektivation des allgemeinen Zielvermögenstheorie und der Rechtsgeschäftslehre. Diese Praktizität spiegelt sich größtenteils auch in seiner, Jhering folgenden Besitzlehre wider. In seiner Zusammenfassung stellt der Verfasser fest, daß, in Betracht des vollen wissenschaftlichen Œuvres, in der ungarischen Rechtswissenschaft allein Szászy-Schwarz als Nachfolger der Jhering'schen Interessenjurisprudenz betrachtet werden kann.

11. Das letzte Kapitel, das das Schicksal der Pandektistik in Ungarn in der Periode von 1920—1945 untersucht, analysiert vorerst die Gründe des Rückgangs der Wirkung der Pandektistik. In der Zurückdrängung der Pandektistik hatte hauptsächlich der die im schweizerischen ZBG zum Ausdruck kommenden Doktrinen vor Augen haltende Entwurf des privatrechtlichen Gesetzbuches entscheidende Rolle. In der Rechtsliteratur wirken aber auf zahlreichen Gebieten — so in der Theorie der subjektiven Rechte, in der Theorie bezüglich des Wesens der Rechtsperson, in der Rechtsgeschäftsdoktrin, in der Haftungskonzeption — die pandektistischen Anschauungen weiter. Im Bereiche der wissenschaftlichen Pflege des römischen Rechts gelangen in der Periode zwischen den beiden Weltkriegen die durch die Pandektistik ausgearbeiteten Kategorien (subjektives Recht, Rechtsgeschäftslehre) und das Pandektensystem zur Rolle.

III.

12. Das einen gewaltigen literarischen Apparat überblickende und das Material in konstruktiver Weise bearbeitende Werk Pólays hat den großen Vorzug, daß es das zwischen der Pandektistik und der heimischen Rechtswissenschaft über zahlreiche Transmissionen zur Geltung kommende, komplizierte Verbindungssystem nach neuen Gesichtspunkten synthetisierend, aufgearbeitet hat. Der Leser dieser aus methodischem Gesichtspunkt tadellosen Arbeit erhält ein neues, nuancierteres Bild sowohl über die auf die Gestaltung der europäischen Rechtswissenschaft eine so große Wirkung ausübende Pandektistik, als auch — in deren Abhängigkeit über die Entwicklung der ein heimischen Rechtswissenschaft. Die in der einheimischen Rechtswissenschaft wie auch in der internationalen Literatur einen hervorragenden Platz verdienende Arbeit kann mit der Aufmerksamkeit der Pfleger des Zivilrechts, des römischen Rechts und der Rechtsgeschichte rechnen.

G. Hamza

Beiträge zu den Beziehungen zwischen Gustav RADBRUCH und Georg LUKÁCS

Heute ist es bereits wohl bekannt, welch gärende Wirkung das Studium in Deutschland und seine dortigen Begegnungen in der denkerischen Entwicklung des 1885 geborenen Georg Lukács gespielt haben. Ab 1906 verweilt er hauptsächlich in Berlin, wo auf ihn Georg Simmel und sein Aussprachezirkel einen entscheidenden Einfluß ausübt. Hier lernt er auch Ernst Bloch kennen, der ihn im Winter 1911/12, gelegentlich ihrer Begegnung in Florenz, überredet, seine Studien in Heidelberg fortzusetzen. Ab 1912 verbringt Lukács tatsächlich zwei Jahre in Heidelberg und setzt seine dortigen Besuche auch nach dem Krieg fort. Sein größtes Erlebnis ist Max Weber und jene Denker, mit denen er — hauptsächlich durch Weber — Bekanntschaft macht. Einer von ihnen ist Gustav Radbruch. Vorliegende Abhandlung befaßt sich — aufgrund der im Lukács-Archiv und Bibliothek (betreut durch das Philosophische Institut der Ungarischen Akademie der Wissenschaften) verwahrten, in der Bundesrepublik Deutschland wie auch auf dem Gebiete der mit Radbruch zusammenhängenden Forschungen bislang unbekannten Dokumente — mit der Wirkung, die Radbruch auf Lukács ausgeübt hat.[1]

*

Unter den Freundschaftsbeziehungen von Lukács war seine Beziehung zu dem sieben Jahre älteren Radbruch vielleicht die markanteste, jedoch ihrem späteren Verlauf nach, die am meisten widerspruchsvolle. Radbruch war ein Denker der in evangelischer Umgebung aufgewachsen ist und bekannt als einer, der sich zur Sozialdemokratie angezogen fühlte und sich zur relativistischen Rechtsphilosophie bekennt. Er war einer der Ersten, der nach der Nazi-Machtübernahme seinen Lehrstuhl verloren hatte. Doch fühlte er sich persönlich betroffen und auch theoretisch verantwortlich dafür, daß sich der Juristenstand so bedingungslos und ohne jedweden Anstoß dem neuen Regim anpaßte. Dies war der Umstand, der Radbruch mit Lukács zusammenbrachte und für die Entwicklung dieser Beiden auch separat voneinander bestimmend war. „Denn damals war in Heidelberg ein Kreis gleichgesinnter Gelehrter tätig, der seinesgleichen nicht oft findet: Windelband (später Rickert), Jellinek, Max Weber, Gothein, Troeltsch, Lask."[2]

Ihre Verbindung ist im Vorwort des ersten wirklich selbständigen rechtsphilosophischen Werkes von Radbruch, *Grundzüge der Rechtsphilosophie* (Leipzig, 1914) verewigt. Radbruch schreibt hier folgendes: „Daß sein Verfasser sich entschloß, seine Gedanken schon jetzt in skizzenhafter Form vorläufig festzulegen, hat er an erster Stelle dem ermutigenden und anregenden Zuspruch des Herrn Dr. Georg v. Lukács in Heidelberg zu danken."

Einige in der letzten Zeit aufgetauchte Stücke ihrer Korrespondenz gewähren von dieser Wirkung ein sehr klares und vertrautes Bild.

Ein Brief aus Bellaria, datiert um den 10—12. September 1913 weist bereits auf ein gutes Verhältnis hin, die schon auf eine gewisse Vergangenheit zurückblickt:

„Lieber Herr Radbruch,

...

Besten Dank für Ihre Nachrichten. Es freute mich, daß Sie einen guten Anfang des Sommers hatten. Hoffentlich geht es weiter

[1] Die publizierten Briefe kamen im vergangenen Jahrzehnt aus dem sogenannten „Heidelberger Koffer" zutage und gelangten in den Besitz des Lukács-Archiv und Bibliothek. Für die mit denselben zusammenhängende Forschungsarbeit schulde ich der früheren Leiterin des Lukács-Archivs und Bibliothek, Frau Katarine Lakos, für die Genehmigung der Verwendung derselben dem urheberrechtlichen Rechtsnachfolger von Lukács, Herrn Professor Ferenc Jánossy Dank.

[2] ‚Lebensbeschreibung von Dr. Gustav Radbruch ...' (1945), *Gedächtnisschrift für Gustav Radbruch*, hrsg. Arthur Kaufmann, Göttingen, 1968, S. 22.

auch gut; sowohl für Sie, wie für das Buch, dem gegenüber ich eine fast persönliche Teilnahme empfinde.

...

Mit herzlichen Grüssen

Ihr

G. v. Lukács"

Der nächste Brief — dem Poststempel nach vom April 1914 — läßt darauf folgern, daß der Umstand, daß Lukács „eine fast persönliche Teilnahme empfindet", seiner, den philosophischen Relativismus bereits in sich bergenden, einer eingehenderen Untersuchung würdigen, denkerischen Entwicklung zugeschrieben werden kann.

„Lieber Herr Radbruch,

bitte fassen Sie es nicht als Interesselosigkeit von mir auf, daß ich Ihnen so lange nicht schrieb; zuerst wollte ich Ihr Buch lesen, dann kamen die verschiedenartigsten Hindernisse ... dazwischen.

Ihr Buch habe ich mit sehr viel Freude und Belehrung gelesen. Ich finde, daß alle Ihre Bedenken gegen die Herausgabe des Buches gänzlich unbegründet waren. Alle Hauptgedanken kommen in großer Klarheit und Reinheit heraus — und wenn Sie vielleicht weniger auf ‚Liberatus' eingehen, als Sie es wollten, wenn einige Darstellungen fremder Systeme (z. B. Hegels) auch tiefer gefaßt werden könnten, so sind das Sachen die in einer zweiten Auflage spielend ergänzt werden könnten. Das Wichtigste ist, daß das Buch in seinen originellen Gedanken auf sehr festen Füßen steht. Was mich methodisch am meisten interessiert hat — Sie entsinnen sich noch aus der Vorlesungszeit — die verschiedenen, gleichwertigen Systeme der Rechtsphilosophischen Orientierung und der Rechtsgestaltung gefallen mir jetzt vielleicht noch mehr wie in den Vorlesungen. Es wäre ein Privatwunsch von mir (der sich garnicht auf Ihr Buch bezieht, ja dessen seine Oekonomie sprengen würde) daß Sie einmal, vielleicht essayistisch — diese verschiedene Systeme noch ausführlicher darstellen, damit bei verschiedenen Axiomen, Maximen und dementsprechenden verschiedener Subaltlichkeit, die Gleichheit und Gleichwertigkeit ihrer letzten Grundlage ganz sichtbar an Tage träte und damit die absolute Notwendigkeit Ihrer Relativismus und dessen Folge der metaforistischen Entscheidung offenbar werde. Freilich ist dies in dem Buche selbst hinreichend überzeugend gestaltet: es ist dies nur ein Privatwunsch von mir — zur eigenen Belehrung; und zur Förderung meiner methodischen Untersuchungen. Über den Rest zur des Buches haben wir ja vor den Vorlesungen ausführlich gesprochen. Der Schluß, den ich aus den Vorlesungen nicht kannte, gefiel mir sehr gut.

...

Mit herzlichen Grüssen

Ihr freundschaftlichst ergebener

Georg von Lukács"

Nicht bloß diese Briefe,[3] aber — in indirekter Weise — auch jene Zeilen sprechen über die gärende Wirkung, die Lukács auf die geistige Entwicklung Radbruchs ausübte, mit denen sich Radbruch am 7. Juni 1914 aus Königsberg an Karl Jasper wandte: „Ich wünsche mir sehr ein Wort von Ihnen über meine Rechtsphilosophie. Ich fürchte: Ihr Schweigen ist eine schweigende Kritik. ... Auch Max Webers Schweigen beunruhigt schon. Ebenso schweigt Lukacs, Frau Staudinger, schweigt Windelband ..."[4] Ob dieses Schweigen tatsächlich als Kritik aufzufassen ist und inwieweit diese begründet ist, darüber hier zu entscheiden kann nicht meine Aufgabe sein. Jedenfalls ist es interessant, daß die einzige Stelle, wo Felix Somló, Lukács's Professor in Klausenburg (Siebenbürgen), Rechtsphilosoph und Soziologe, in den 1910er Jahren Lukács's Freund, in seinem handschriftlichen Tagebuch den Nàmen Lukács's überhaupt erwähnt, verurteilenden Charakters ist, und vor allem in Hinsicht auf Radbruch. Unter der Jahreszahl 1914 ist nämlich folgende Eintragung zu lesen: „8. Nov. Die neueste deutsche Rechtsphilosophie ist auch angekommen: Radbruch, Grundzüge der Rechtsphilosophie... Es ist sonderbar, daß, laut des Vorwortes, Radbruch seine Gedanken in dieser skizzenhaften Form noch nicht

[3] LAK M/307.

[4] Gustav Radbruch, *Briefe*, hrsg. Erik Wolf, Göttingen, 1968, S. 53.

dargeboten hätte, hätte ihn dazu in erster Linie Herr Georg Lukács nicht ermuntert. Die Verantwortung für die Veröffentlichung kann nicht dem Ermunterer zugeschoben werden. Wenn ich mein Werk nicht zur Publikation reif empfinde, würde ich es nicht nur nicht auf Ermunterung von Gyuri Lukács, sondern keines anderen herausgeben. Das Werk ist tatsächlich nicht reif. Erstens ist es in seinem Problemenkreis zu eng. Aber auch in der Ausarbeitung dieser Probleme nicht umfassend genug. Es will auch übertrieben geistreich sein. Es will Probleme durch Esprit lösen. Es werden Widersprüche leichtfertig stehen gelassen. Das ist keine gute Idee. Das ist nicht die Rechtsphilosophie mit der die deutsche Rechtswissenschaft seit langem schwanger war. Das ist bloß eine Fehlgeburt der Mutter, die einen Messias zur Welt bringen wollte."[5]

Was die Wirkung Radbruchs auf Lukács betrifft, müssen wir von einer wenn auch nur vorübergehenden, jedoch nicht gering zu schätzenden Rolle berichten. Aus seinen autobiographischen Skizzen[6] ist es uns bekannt, daß Lukács bereits während seiner Gymnasialzeit mit mehreren Werken der Klassiker des Marxismus Bekanntschaft machte. Diese Bekanntschaft wurde Später mehrmals erneut und vertieft. Solange er aber die philosophische Bedeutung Hegels nicht erkannte, wirkte auf ihn auch Marx, vor allem als Volkswirt und Soziologe, durch Simmel und Weber vermittelt. Die marxistische Wirkung war also einstweilen gering und bezog sich auf solche Gebiete des gesellschaftswissenschaftlichen Denkens, deren Rolle zu dieser Zeit noch kaum mehr sein durfte als Zusatzmaterial. Ebendeshalb verdient der Umstand besondere Aufmerksamkeit, daß die erste Schrift von Lukács, in der Marx meritorisch erwähnt wird, die Kritik der Geschichtsphilosophie von Benedetto Croce ist. Sie ist eine soziologisierend vereinfachte Abfassung des Programms des Marxismus, wo Lukács die Radbruch-Methode als Beispiel dahinstellt.

Lukács wünschte in diesem seinen Artikel, mit der neokantianischen Präsupposition der Immanenz des Bewußtseins ringend, zu beweisen, daß „Dass dies vom Inhalt der axiomatischen Setzung der Geschichtswissenschaft abhängt, haben wie oben zu zeigen versucht; wie auch darauf hingewiesen wurde, dass deren Inhalte bei wirklich eingehender, unbefangener und sorgfältiger Analyse eine merkwürdige Parallelität und Beziehung zu gesellschaftlichen Schichtungsverhältnissen. Verschiebungen, äusseren wie inneren Aenderungen aufweisen, dass sie sich also zum Gegenstand der Wissenschaft, deren konstituierendes Objekt die Formen der menschlichen Gesellschaft sind, eignen. Dass der historische Materialismus, die bisher bedeutendste soziologische Methode, fast immer zur geschichtsphilosophischen Metaphysik wurde, darf nicht den epochemachenden Wert der ihm zugrund liegenden, nur bis jetzt noch nicht klar herausgearbeiteten Methode vergessen lassen. In dem, was Marx das Ideologienproblem nennt, liegt — freilich seiner metaphysischen Begriffsbildung entkleidet und methodisch reingemacht — der Weg zur Lösung des Problems, das ich hier angedeutet habe: die Erkenntnis, was die durch ihre eigene Axiomatik formell bedingten Setzungen der Wissenschaften des objektiven Geistes, notwendig mit konkreten Inhalten erfüllt. Ich verweise hier auf die sehr interessanten Ausführungen Radbruchs, der die mögliche Typik der Wertstruktur, das Fundament rechtsphilosophischer Systeme mit der Typologie der parteipolitischen Stellungnahmen in Beziehung bringt und so, bei Beibehaltung der juristischen Immanenz und Allgemeingültigkeit juristischer Kategorien, ihre konkrete Erfüllbarkeit nicht nur aus metajuristischen Quellen herleitet, sondern auch den Punkt aufweist, von dem aus sie begriffen werden kann (Grundzüge der Rechtsphilosophie S. 96 ff.). Ich muss betonen, dass Radbruch das Problem nur von der

[5] Tagebuch von Felix Somló, 1914—1917, S. 34. f. Országos Széchényi Könyvtár (Nationalbibliothek Széchényi) Handschriftenarchiv, Quart. Hung. 3038/III.

[6] Georg Lukács, ‚Mein Weg zu Marx', *Internationale Literatur*, III (1933) 2, S. 178 ff; Georg Lukács, ‚Vorwort', *Geschichte und Klassenbewusstsein*, Neuwied und Berlin, 1968, S. 11.

Seite der Rechtsphilosophie aufwirft und auf seine soziologische Diskussion nicht näher eingeht. Für seine Problemstellung mit Recht; aber mir scheint dennoch, dass er den methodischen Ort, wo dieses Problem liegt, am deutlichsten aufgewiesen hat."[7]

Wie aus diesen Darlegungen hervorgeht, verwandelte sich dieselbe Radbrucher Typologie, die in dem Brief aus 1914 noch als Beweis der „absoluten Notwendigkeit" des Relativismus diente, nunmehr in das Vorgefühl der gesellschaftlichen Determiniertheit der darin enthaltenen konkreten Bewußtseinsinhalte. Die aus der Erkennung der Untersuchung der gesellschaftlichen Zusammenhänge als grundlegendes methodisches Prinzip stammende Anschauungsänderung — zumindest auf der Ebene der Problemenbestimmung — strahlte auch auf andere Gebiete aus. Sich dieser Periode erinnernd schreibt Lukács: „die karge und formelle Gegenüberstellung der Legalität und der Moralität wirkte durch Kants Vermittlung ... lange Zeit hindurch stark auf mich, hat mich aber nie befriedigt". Es ist klar, daß es sich hier um die gesellschaftliche Gebundenheit gewisser — in einer gegebenen Art objektivierter — Bewußtseinsimmanenzen handelt. Das aber bedeutet nichts anders, als daß die Inbetrachtnahme des gesellschaftlichen Gesichtspunktes die Kant'sche Methodenlehre — die auf rein logische Unterscheidungen baut — auseinandersprengt. „Der untrennbare Zusammenhang der rein formellen Pflichtmoral mit den praktischen Anforderungen der jeweils herrschenden gesellschaftlichen Lage und Entwicklung, hauptsächlich mit dem jeweiligen Rechtssystem war für mich nur zu klar."[8] Deshalb widmet er jetzt der Solowjeff'schen Auffassung der gegenseitigen Voraussetzung des Verhältnisses des Rechts und der Moral Aufmerksamkeit genauso, wie auch dem durch Georg Jellinek vertretenen ethischen Minimum.[9] Das ist die Erklärung dafür, daß Lukács bei der Analyse der philosophischen Leistung von Emil Lask jenem Experiment weitgehende theoretische Bedeutung zuspricht, in dem Lask den spezifischen Geltungscharakter des Rechts ausgearbeitet und sein Verhältnis zu den übrigen Sphären festgestellt hat.[10]

Die in Heidelberg verbrachten Jahre weisen noch ein bemerkenswertes Moment auf. Dieses Moment wirft nicht bloß auf die damalige ideologische und moralische Gemeinschaft von Lukács und Radbruch Licht, aber es gibt auch der unmißverständlichen Verurteilung des Krieges auf moralischer Basis ein Gewicht, das mitgespielt haben mag, daß die Ereignisse Lukács binnen eines Jahres zur kommunistischen Partei getrieben haben. Was ich meine ist, daß Radbruch ein kämpferischer Pazifist gewesen ist; seine Taten wurden durch sein „soziales Grundgefühl" gelenkt.[11] Ihn sehen wir „als freiwilligen Krankenpfleger im Dienste des Roten Kreuzes, später als Soldaten und schließlich als Offizier an der Westfront"[12], der sein denkendes Ich in den Dienst der Kriegsfeindlichkeit stellte und die Philosophie des Krieges in einem einen entscheidenden Widerhall auslösenden Studie erörterte.[13]

Kaum hatte Lukács diese Schrift gelesen, als er seine völlige Identifizierung ausdrükkend schon antwortete.

"Heidelberg, Keplerstrasse 28.
11/III. 1917.

Lieber Herr Professor,

... Ihr Aufsatz hat mich sehr interessiert. Ihnen und darüber zu schreiben ist mir

[7] Georg v. Lukács, ‚Croce, Benedetto: Zur Theorie und Geschichte der Historiographie. Tübingen, J.C.B. Mohr. 1915', *Archiv für Sozialwissenschaft und Sozialpolitik*, XXXIX (1914), S. 884.

[8] György Lukács, ‚Előszó (Vorwort)', *Utam Marxhoz: Válogatott filozófiai tanulmányok* (Mein Weg zu Marx: Ausgewählte philosophische Aufsätze), Bd. I, Budapest, 1971, S. 14.

[9] Georg Lukács, ‚Solowjeff, Wladimir: Die Rechtfertigung des Guten. Ausgewählte Werke, Bd. II. Jena 1916', *Archiv für Sozialwissenschaft und Sozialpolitik*, XLII (1916—1917), S. 978 ff.

[10] Georg Lukács, ‚Emil Lask', *Kant-Studien*, XXII (1918) 4, S. 349 ff.

[11] Gustav Radbruch, *Der innere Weg: Aufriss meines Lebens*, Göttingen, 1961, S. 107 ff.

[12] Günter Spendel, *Gustav Radbruch: Lebensbild eines Juristen*, Hamburg, 1967, S. 8.

[13] Gustav Radbruch, ‚Zur Philosophie dieses Krieges', *Archiv für Sozialwissenschaft*, XLIV (1918)

darum nicht leicht, weil ich mit den meisten Ihrer Ausführungen ganz einverstanden bin. Einzelne Sachen wollte ich im Sommer 1915 bevor ich einrücken müsste, in einem unvollendet gebliebenen Aufsatz ‚Die Intellektuellen und der Krieg' schreiben. So vor allem, den mir sehr wichtig erscheinenden Gedanken, dass das ganze Problem der ‚Macht' eine hypostasierte methodologische Voraussetzung der politischen Geschichtswissenschaft ist; auch Ihre Unterscheidung von ‚Sinn' und ‚Bedeutung' ist mir vertraut und gehört zu meinen Überzeugungen. Für sehr wichtig halte ich Ihre Auffassung der ‚Schuld'-Frage und die symptomatische Bedeutung der gegenseitigen Ablehnung der Verantwortung für den Krieg (die durch die Analyse des Zusammenhanges von Krieg und Diplomatie gut vorbereitet ist). Hier liegt in der Tat etwas, das nur diesem Kriege zukommt. Doch ich sehe: ich schreibe keine Bemerkungen sondern einen Auszug: daraus können Sie ersehen, dass Ihr Aufsatz mir sehr gut gefallen hat. Jetzt, nach einer langen, harten mir liegenden Lektüre ist es mir sogar schwer Differenzpunkte aufzufinden. Doch wenn Sie doch nach Heidelberg kommen, wird ja alles sich im Gespräch anders Machen? Ihr

G. v. Lukács"

Radbruchs Antwort hat einen ähnlich warmen, und gleichzeitig dankbaren Ton. Auf einer Feldpost-Karte schreibt er am 3. April 1917:

„Lieber Herr v. Lukács,

vielen Dank für Ihren freundlichen Brief. Ihre Bemerkungen zu meinem Aufsatz freuen mich sehr. Man kann für derartige Gesinnungen ja sich kaum irgendwo Zustimmung finden. Sie kann sich selbst ohne allerlei innere Widerstand abgewinnen. Nähme nur diese Zeit, die einen zu solcher seelisch zermürbenden Zwiespältigkeit, zu lauten halben Stellungnahmen ständigen reservativ mentalis und protestativ facto contrario nötigt, endlich ein Ende!

. . . Allen Heidelbergern herzlichen Grüsse, besonders Ihnen

von Ihren

Gustav Radbruch"

*

Nach einer solchen Vorgeschichte und einem solchen Briefwechsel[14] wirkt es überraschend, — in Kenntnis der Persönlichkeit der Personen und Auseinanderzweigung ihrer Wege aber vielleicht doch auch charakteristisch, — daß danach die ehemaligen Freunde aufhören für einander zu existieren. Der Name Lukács' erscheint nachher weder in den zahlreichen Werken Radbruchs, noch in seinen umfangreichen biographischen Schriften. Dasselbe gilt für Lukács. Er erwähnt nicht nur nicht mehr Radbruchs Namen, hat aber nicht einmal soviel für den ehemaligen Berufsgenossen übrig, daß er mit dem bis 1949 lebenden und wirkenden — dazu noch als ein *zuhause* gebliebener und *zuhause* kämpfender Märtyrer des Faschismus gepriesenen — deutschen Rechtsgelehrten mit enzyklopädischem Wissen, mit dem großen rechtsphilosophischen Erzieher von Generationen wieder in Verbindung tritt. Er nahm sich auch nicht die Mühe, daß er nach seiner Rückkehr nach Ungarn, bei der Ersetzung und Entwicklung seiner viel gelittenen Privatbibliothek, die er zielbewußt, durch Inanspruchnahme seiner privilegiert guten Antiquariatsbeziehungen herzustellen versuchte, auch nur eines von Radbruchs Werken aufs neue anschaffte.

Cs. Varga

[14] LAK M/246/1.

MIHOLICS, T.: Arbeitsverrichtungspflicht im Arbeitsrecht*

Die Arbeitsverrichtung ist vielleicht die wichtigste Offenbarung des menschlichen Daseins. Es ist seit den ältesten Zeiten bis heute eine zentrale Frage, in welchen Rahmen die Arbeit verrichtet ist, welche die treibenden Kräfte sind, welche die Richtung der Arbeitsverrichtung ergeben.

Tivadar Miholics untersucht die Arbeitsverrichtung in Rahmen der sozialistischen Gesellschaft, in solcher Weise aber, daß er von Zeit zu Zeit auch die Gesetzgebung einiger westlichen Staaten auch in Betracht zieht. Seine Darlegungen beruhen dabei in erster Reihe auf dem ungarischen positiven Recht, was aber nicht ausschließt, daß er als Ergänzung seiner Darlegungen auch weiterreichende rechtsvergleichende Feststellungen macht.

Der Verfasser untersucht die Frage der Arbeitsverrichtungspflicht nur von der Seite der Pflichte des Arbeitsnehmers, es folgt dann daraus, daß er sich mit der anderen Seite, mit der Beschäftigungspflicht der Arbeitsgebers nicht beschäftigt. Er geht auf die Arbeitsverrichtungsverhältnisse im Rahmen von durch andere Rechtszweige geregelten gesellschaftlichen Verhältnissen ebenfalls nicht ein. Diese Abgrenzung seines Themas ermöglicht die genaue Beaugenscheinung der zu untersuchenden Frage, die Konzentration der Aufmerksamkeit auf die, mit der Arbeitsverrichtung zusammenhängenden grundlegenden Fragen.

Der *erste Teil* des Buches behandelt die allgemeinen Fragen der Arbeitsverrichtungspflicht, undzwar in zwei Abschnitten, von welchen der erste sich mit dem Wesen der Arbeitsverrichtung, als Rechtsverpflichtung, mit ihrer Personalpflichtwerdung, während der zweite mit dem allgemeinen Inhalt der Arbeitsverrichtungspflicht, mit ihren wichtigeren Inhaltselementen, mit ihrer Bestimmungsweise beschäftigt. Nun einige Gedanken aus der diesbezüglichen Beweisführung des Verfassers!

Der Verfasser weist darauf hin, daß man über Arbeitsverrichtungspflicht nur infolge der Tatsache reden kann, daß die Rechtsnorm diese für den Fall bestimmten Bedingungen vorschreibt, bzw. sogar die Verwirklichung dieser Pflicht schließlich vom zwingenden Staatsapparat gesichert wird. Das Arbeitsrecht verwendet sogar über die Rechtsquellen hinausgehende Rechtsmittel eben auf dem Gebiet der Arbeitsverrichtungspflicht. So z. B. spielt in der Bestimmung der Arbeitsverrichtungspflicht in Rahmen der Rechtsnorme auch die Anweisung des Arbeitsgebers eine wichtige Rolle. Die Voraussetzung von all diesen ist aber, daß der Arbeitsnehmer mit dem Arbeitsgeber in ein Rechtsverhältnis eingeht, dessen häufigste Form der Arbeitsvertrag ist.

Im Zusammenhang mit einer kennzeichnenden Eigentümlichkeit der Arbeitsverrichtung aufgrund eines Arbeitsrechtsverhältnisses, mit dem persönlichen Charakter der Arbeitsverrichtung weist der Verfasser im weiteren darauf hin, daß es auch Ausnahmsfälle gibt, wenn der Arbeitnehmer in die Arbeit auch andere Personen einbeziehen kann, bzw. wenn im Verhinderungsfalle der Arbeitsnehmer selbst für die Vertretung Sorge tragen soll (pp. 53—54). Wir möchten nun dies damit ergänzen, daß neuerdings — besonders in Amerika — der sogenannte „jobsharing" — Arbeitsvertrag vorkommt, dessen Wesen darin besteht, daß an einer gewissen Arbeitsstelle zwei oder mehrere Personen eine Aufgabe verrichten, für deren Erfüllung sie gemeinsam verantwortlich sind. Diese Form des Arbeitsrechtsverhältnisses kommt nicht nur im Zusammenhang mit der Büroarbeit, sondern auch bei Ingenieuren, Busfahrern, bei dem Wartepersonal im Krankenhaus, bei Monteuren, usw. vor. Wenn einer von ihnen nicht in Arbeit treten kann, verrichtet der andere in seiner Statt die Arbeit, einer von ihnen muß aber die Arbeit immer ausführen. An der Seite des Arbeitnehmers ist der Vorteil

**Munkavégzési kötelezettség a munkajogban*, Közgazdasági és Jogi Könyvkiadó, Budapest, 1980. 324 p.

dieser Konstruktion die größere Unabhängigkeit bei der Arbeitszeiteinteilung, während bei dem Arbeitgeber der Vorteil darin besteht, daß im Verhinderungsfalle des Arbeitnehmers er für keine äußere Arbeitskraft sorgen muß.

Sehr interessant sind die Erörterungen des Verfassers auch in der Beziehung, was für eine Rolle die sozialistische Moral in der Bestimmung der Arbeitsverrichtungspflicht spielt. Er weist auf die Fälle hin, wenn die Rechtsnorm irgendeine früher in sittlicher Regel gefaßte Verhaltungsregel enthält, was im Prozess der Rechtsanwendung oft vorkommt. Ein anderes Mal verordnet die Rechtsregel nur mit hinweisender Regel die verbindliche Berücksichtigung der Sittennorm. In solchem Falle wird die Rechtsregel der Vermittler der Sittennorm.

In solchem Sinne spielen die Sittennormen an dem vom Rechts bestimmten Gebiet auch unmittelbar eine Rolle. Der Verfasser weist auch darauf hin, daß in den arbeitsrechtlichen Regelungen der sozialistischen Länder zweierlei Methode der Verwendung der Sittenregel in der Bestimmung der Verpflichtungen hinsichtlich der Arbeit der Arbeitnehmer zur Geltung kommt. In einigen sozialistischen Ländern ist die Beobachtung der Grundsätze der sozialistischen Zusammenarbeit im Zusammenhang mit der Verpflichtungen hinsichtlich der Arbeit der Arbeitnehmer mit allgemeinem Charakter verordnet. Eine andere Methode der Anwendung der Sittenregel ist dagegen, wenn der Inhalt der Teilverpflichtungen des Arbeitnehmers hinsichtlich der Arbeit mit Begriffen vom unterschiedlichen moralischen Inhalt bestimmt ist. Diese letztere Lösung kommt auch in der ungarischen arbeitsrechtlichen Regelung zur Geltung, wenn z. B. die Rechtsregel verfügt, daß der Arbeitnehmer die zu seinem Arbeitsbereich gehörige Arbeit mit der ihm zumutbaren Sorgfalt zu verrichten verpflichtet ist. Die Rechtsregel bestimmt aber den Inhalt des Begriffes „zumutbare Sorgfalt" näher nicht, sondern rechnet mit dessen gesellschaftlich entwickeltem Inhalt, in welchem eben die Norme der sozialistischen Arbeitsmoral eine bedeutende Rolle spielen. Der Verfasser ist der Meinung, daß im Kreise der Arbeitsverrichtungspflicht die Anwendung der moralischen Regel in steigendem Masse notwendig wäre, sogar die Aufnahme einer Verfügung allgemeinen Charakters bezüglich der Anwendung der Regel der sozialistischen Moral, besonders der Arbeitsmoral wohlbegründet scheint. Damit sind wir vollkommen einverstanden.

Die Mangelhaftigkeiten der Arbeitsverrichtung, die Ungenauigkeiten, der Mangel des Pflichtbewußtseins sind oft darauf zurückzuführen, daß die Arbeitsmoral ungenügend ist, die Frage ergibt sich nur, ob die Aufnahme einer Verfügung allgemeinen Charakters bezüglich der Verwendung der sozialistischen Arbeitsmoral in die Rechtsregel eine wesentliche Änderung der Lage mit sich bringen würde? Unseres Erachtens wäre vor allem die Bewußtseinsänderung der Menschen in solcher Richtung notwendig, daß sie bei ihrem alltäglichen Verhalten den ethischen Erforderungen motu proprio genügen. Dann werden die sogenannten moralischen Erforderungen zur weiterreichenden Geltung kommen.

Der Verfasser beschäftigt sich mit dem Inhalt der Arbeitsverrichtungspflicht im *zweiten Teil* seines Buches. Dieser ist der umfangreicheste Teil des Werkes, was selbstverständlich ist, da das Wesen der Arbeitsverrichtung sich im deren Inhalt verkörpert. Da kommen solche Fragen in den Vordergrund, was (Arbeitskreis), wann (Arbeitszeit), wo (Arbeitsplatz) und wie (Art der Arbeitsverrichtung) verrichtet werden soll.

In Zusammenhang mit dem Arbeitskreis beschäftigt sich der Verfasser unter anderen damit, ob der *Arbeitskreis* der Arbeitsnehmer in dem Vertrag weit oder eng bestimmt werden soll, welche Gesichtspunkte für die weitere oder engere Bestimmung des Arbeitskreises an der Seite des Arbeitgebers bzw. Arbeitsnehmers sprechen.

In Zusammenhang mit der *Dauer* der Arbeitsverrichtung (Arbeitszeit) weist der Verfasser unter anderen darauf hin, daß die Teilarbeitszeit ebenfalls als normale Arbeitszeit qualifiziert werden soll, überdies kann der Arbeitnehmer regelmäßig nur nach der Abänderung des Arbeitsvertrags, durch die

Änderung der Stipulation hinsichtlich der Teilarbeitszeit beschäftigt werden.

Der Verfasser erörtert auch die Frage der sogenannten ungebundenen Arbeitszeit, welche auch ein, wenig ausgearbeitetes Gebiet des Arbeitsrechts ist.

Man muß mit dem Verfasser auch in seiner Feststellung einverstanden sein, daß in unseren Rechtsregeln von den Grundsätzen hinsichtlich der Einteilung der Arbeitszeit die Verfügungen bezüglich der Berücksichtigung der Ansprüche des Gestamtinteresses fehlen. Es soll aber erwähnt sein, daß die Praxis sich immer mehr nach diesem Standpunkt richtet, so besonders im Falle solcher Unternehmen und Ämter, welche mit den Bewohnern in unmittelbarer Verbindung stehen.

Die Erörterungen über die Arbeitsverrichtung über die normale Arbeitszeit und über deren Grenzen können von mehreren Standpunkten aus Interesse beanspruchen. Da untersucht der Verfasser vor allem die Gründe der Verordnung der Arbeitsverrichtung über die normale Arbeitszeit und die Typen der Beschäftigung.

Der Problemenkreis des Arbeitsplatzes kann ebenfalls aus mehreren Standpunkten aus Interesse beanspruchen. Der Verfasser leitet richtig ab, daß das Begriffspaar ständiger Arbeitsplatz und wechselnder Arbeitsplatz nicht alle Fälle umfaßt, sondern als Dritte die Kategorie des äußeren Arbeitsplatzes aufgenommen werden soll. Der Verfasser hält die Bestimmung des Arbeitsplatzes (ständigen Arbeitsplatzes) in weiterem Kreise als die Anlage nicht begründet, da die praktischen Erfahrungen bezeigen, daß der weiteste Kreis der Arbeitnehmer seine Arbeit normalerweise an einem von der Anlage des gegebenen Unternehmens begrenzten Gelände verrichtet. Das folgt eindeutig daraus, daß die produktive und administrative Tätigkeit bei den Unternehmen grundsätzlich an sogenannten angelegten Arbeitsplätzen ausgeführt ist. Vom Standpunkt der Arbeitsverrichtungspflicht aus ist die Feststellung des Arbeitsplatzes übrigens deshalb bedeutungsvoll, weil der Arbeitgeber den Arbeitnehmer innerhalb der Grenzen seines Arbeitsplatzes, d. h. seines ständigen, äußeren bzw. wechselnden Arbeitsplatzes einseitig auf andere Arbeitsstelle einteilen kann. Damit verbunden beschäftigt sich der Verfasser mit den Möglichkeiten und Grenzen der Arbeitsverrichtung außerhalb des normalen Arbeitsplatzes.

Was nun die *Art der Arbeitsverrichtung* betrifft, stellt der Verfasser fest, daß in dieser Frage bisher sich keine einheitliche, auf entsprechenden prinzipiellen Grundlagen beruhende Regelung ausgestaltet hat, bzw. sogar die literarische Bearbeitung der Frage nicht geschehen ist. Dann legt der Verfasser seinen Standpunkt hinsichtlich des Kreises der Anforderungen und der zu beobachtenden Direktiven dar, wobei er feststellt, daß die Arbeit in solcher Weise verrichtet werden soll, wie das in dem gegebenen Arbeitskreis von den Arbeitnehmern im allgemeinen zu erwarten ist. Diese Erwartung ist bei den, hinsichtlich der Menge und Qualität der Arbeit gestellten Anforderungen auch maßgebend, insofern diese Anforderung das von den Arbeitnehmern im allgemeinen zu erwartende Arbeitsmaß nicht übertrifft.

Der *dritte Teil* des Buches erörtert die einzelnen Fragen der Befreiung von der Arbeitsverrichtungspflicht, wo in zwei Absätzen eigentlich die Fälle der Einstellung der Arbeitsverrichtungspflicht behandelt sind (Verpflichtungen des Arbeitsnehmers in den Fällen der Befreiung von der Arbeit, Vergütung und Zeitanrechnung für die wegen Arbeitseinstellung ausfallende Zeit).

Unseres Erachtens befriedigt das Werk des Verfassers in erster Reihe theoretische Ansprüche, dadurch daß er gewisse Begriffe klarstellt, die diesbezüglichen verschiedenen Ansichte analysiert, schließlich seine eigene Meinung zusammenfaßt. Gleichzeitig vermeidet er die, in der Arbeitsrechtsliteratur manchmal vorkommende übertriebene Theoretisierung, er strebt überall nach klaren Lösungen, und unterläßt die komplizierten Beweisführungen. Eben deshalb kann das Buch auch bei den praktizierenden Juristen Interesse beanspruchen, da sie viele Anleitungen zur alltäglichen Arbeit finden können. Das Werk ist mit Literaturverzeichnis, Sachverzeichnis, sowie mit russischen und deutschen Resümeen ergänzt.

L. Trócsányi

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Varia

The Tokyo Round and the international trade order

It is a general view that the Tokyo Round of multilateral trade negotiations was the most comprehensive held within the GATT since its founding in 1948. One of the main differences between the Tokyo Round and the other six rounds is that the agreements concluded during the Tokyo Round covered not only tariffs, but also certain important non-tariff measures which brought new rules into the GATT system, which was practically unchanged and partly outdated since 1948.

Background to the negotiations

The necessity of further trade negotiations was recognized by the GATT already in 1967, just after the Kennedy Round.[1] It was clear that for the further liberalization of world trade much more was needed than the mere reduction of tariffs. As a result of the six earlier rounds, the level of tariff protection was drastically reduced. By the end of the Kennedy Round, the tariff average on industrial products was not more than 7,2 per cent in the major developed contracting parties. The lower the level of tariff protection was, the more the trade limiting effects of some non-tariff measures were felt. According to a non-tariff measures inventory drawn up in 1968 by GATT, 800 non-tariff measures were notified by exporting countries as adversely affecting their trade.[2]

During the Kennedy Round, but especially in the preparatory years of the Tokyo Round, it became evident that the GATT had to find the ways and means to integrate the developing countries with their special financial and trade problems into the GATT system on a permanent legal basis. Besides the questions relating to non-tariff measures, the handling of problems concerning the developing countries provided another main distinguishing element of the Tokyo Round.

The necessity for having a comprehensive and new-rule-creating round of trade negotiations was clearly reflected in the basic document of the Multilateral Trade Negotiations, in the Tokyo Declaration[3] which was adopted in September 1973 by the ministers of 102 countries. According to the Declaration, the overall aim of the Tokyo Round was "to achieve the expansion and ever-greater liberalization of world trade...".

Unlike the sixties, the period of the Kennedy Round, the economic climate during the Tokyo Round was unfavourable. Some new and unexpected factors, such as the energy crisis, rocketing energy and raw material prices, inflation, exchange rate disturbances, inadequate investments, growing unemployment, and, as a consequence, the increasing protectionist measures combined with old controversies among the major

[1] For details of the history of the Tokyo Round see: *The Tokyo Round of Multilateral Trade Negotiations.* I–II GATT. Geneva, 1979. and 1980. and *GATT Activities in 1979* and Conclusion of the Tokyo Round Multilateral Trade Negotiations (1973–1979) GATT. Geneva, 1980.

[2] GOLT, S.: *The GATT Negotiations, 1973–1975: A Guide to the Issues.* British-North American Committee. 1974. pp. 30–31.

[3] *GATT Basic Instruments and Selected Documents (BISD) 20th Supplement,* pp. 19–22.

negotiating countries (see especially the struggle between the United States and the Community, concerning the common agricultural policy, or the fight of the EEC and other countries to make the USA abolish the special countervailing duty legislation, etc.) made the negotiations more and more difficult. But seeing the possible disastrous political and economic consequences of a trade war, the leaders of the three big negotiating partners (USA, EEC, Japan) recognized that they had no acceptable alternative to strengthening or at least maintaining some sort of discipline and co-operation in the field of international trade. That is why, *W. Haferkamp,* EEC commissioner for external relations said the Tokyo Round "was condemned to succeed".[4] After removing all the political and legal obstacles, it was possible to finalize the negotiations on 12th April, 1979.

Results of the Tokyo Round

Tariffs

The total value of trade affected by Tokyo Round most-favoured-nation tariff reductions and by bindings of prevailing tariff rates, amounts to more than US $ 150 billion, measured on mfn imports in 1977. The weighted average tariff on manufactured products in the world's nine major industrial markets will decline from 7.0 to 4.7 per cent, representing a 34 per cent reduction of customs collection. On agricultural products, an overall average could not be calculated since many commodities are affected by measures other than tariffs.[5]

Although the tariff reductions are not without significance, nevertheless, taking into account the already low initial rates and the slow introduction of new rates (the introduction of new rates requires 8 years), it is most probable that this time the negotiations will not be chiefly remembered because of the tariff reductions.

Non-tariff measures

The greatest achievement of the Tokyo Round is the conclusion of the following agreements (codes of conduct) covering non-tariff measures:

Agreement on Technical Barriers to Trade (Standard Code),
Agreement on Government Procurement,
Agreement on Interpretation and Application of Articles VI, XVI and XXIII (Subsidy Code),
Agreement on Implementation of Article VII—Protocol to the Agreement on Implementation of Article VII (Customs Valuation Code),
Agreement on Import Licensing Procedures,
Agreement on Implementation of Article VI (Anti-Dumping Code).[6]

It was a great success of the Tokyo Round that the negotiators were able to find ways of making some non-tariff barriers negotiable at multilateral level. It is an apparent feature of the codes that—except for the Government Procurement Code and some provisions of the Subsidy and Countervailing Duty Code—they provide an international framework for the co-operation of governments instead of prescribing rigid disciplinarian rules. Each code establishes rules and procedures aiming at preventing governments from adopting trade restricting measures. Some of the codes (the best example is the Standard Code) oblige governments to inform other signatories about the proposed measures and to invite their comments on the draft. The codes set up standing committees to administer the agreements. All the agreements contain provisions for consultation and dispute settlement; they also provide for special and more favourable treatment for developing countries.

The codes—with the exception of the Customs Valuation and the Government Procurement Codes which came into force on 1st January, 1981—have been in force since 1st January, 1980. Their fate and effectiveness is going to depend on how they are implemented

[4] GRAHAM, T. R.: *Revolution in Trade Politics,* Foreign Policy, Fall 1979. p. 52.

[5] GATT, *The Tokyo Round...* 1. p. 120.

[6] The texts of the agreements concluded during the Tokyo Round see: *GATT. BISD; 26th Supplement.* pp. 3–188.

by the signatories. Although experience—because of the short time elapsed since their entering into force—is limited, nevertheless, the implementing legislations of some signatories show how the particular governments interpret the agreements. From the point of view of our examination, the US approach is quite remarkable. The US implementing legislation, the Trade Agreements Act of 1979—in spite of para. 1 of Article I of the General Agreement which prescribes, in an obligatory way, the granting of unconditional mfn to all contracting parties—adopted a conditional mfn approach denying treatments prescribed by the new codes to contracting parties which are not signatories of the particular codes.[7] It is interesting to note that during GATT drafting sessions US negotiators characterized the unconditional most-favoured-nation principle as "absolutely fundamental".[8] But now the Trade Agreements Act establishes a system of open reciprocity in which new concessions are extended only in return for new concessions received. Though the signatories have not yet finished the examination of the national implementing legislations, it can be taken for granted that many countries are going to challenge the legality of the US approach on the basis of the relevant GATT provisions. The first case against the US conditional mfn treatment concerning the Subsidy Code has been brought before the GATT by India, because the US, referring to the lack of legal relationship between the US and India under the Subsidy Code stemming from the fact that the United States invoked the non-application clause of the Code against India, imposed a countervailing duty on Indian products without applying the "injury test" as provided for by the Code.[9] Although the dispute is far from being resolved, the attachment of the majority of the contracting parties to the mfn is clearly seen, inter alia, from the Decision of the CONTRACTING PARTIES at their annual session in November, 1979.[10] The developing countries and the socialist countries condemned the further limitation of the unconditional mfn, at other fora as well.[11] The lack of clear-cut statements on this issue on the part of the developed countries belonging to the OECD seems to be significant.

Framework for the conduct of world trade.

In the Tokyo Round changes in the framework of world trade were brought about in two ways. Concerning certain non-tariff measures, the improvements were effective through the above-mentioned agreements. In other areas, the negotiations were entrusted to the so called "framework" group. Four agreements emerged from the framework group and were adopted by GATT member-states at their annual session in November, 1979. The four agreements are the following:

—Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,

—Declaration of Trade Measures Taken for Balance-of-Payments Purposes,

—Safeguard Action for Development Purposes,

—Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

The first agreement which is by far the most important one, is known as the "enabling clause", since it—codifying formal GATT practice based on provisional waivers—permits developed contracting parties to give more favourable treatment only to developing countries and special treatment to the least-developed countries, notwithstanding the most-favoured-nation provisions of Article I of the General Agreement. The provisions of the "enabling clause" relating to

[7] See the statement of a leading US. official in: *US. Mission Daily Bulletin*. Geneva 30. June 1980.

[8] Quoted in JACKSON, J. H.; *World Trade and the Law of GATT*, 1969, p. 252.

[9] For details of the case see: *India-America Trade. Pulling the Rug out*, The Economist, 13. September 1980., *Handelskriegsstimmung im GATT? Wirtschaftliche Großmächte als Angeklagte*, Neue Zürcher Zeitung, 11. November 1980.

[10] *GATT BISD 26th Supplement* p. 201.

[11] *UNCTAD TD/B/770* pp. 34–35, *UNCTAD TD/B/798* pp. 41–43.

reciprocity reaffirm and strengthen the commitment by developed countries not to seek concessions inconsistent with the needs of their developing partners in trade negotiations. In turn, the clause states the expectation of developing countries regarding their future participation in the GATT system in line with their increased capacity to do so. This would reflect the expected progressive development of their economies.

What the Tokyo Round failed to settle

According to the Tokyo Declaration, the negotiations had to aim to "include an examination of the adequacy of the multilateral safeguard system...".

The practice before the Tokyo Round has shown that the GATT's safeguard clause (Article XIX) had deficiencies that made it's use difficult.[12] Article XIX, inter alia, requires any action taken to be applied in a non-selective, non-discriminatory manner, and not only against the country whose exports are causing injury. The country affected by the measure is entitled to take retaliatory, compensatory measures against the country applying Article XIX.

The inadequacies of Article XIX led to the proliferation of "voluntary" export restraints and orderly marketing arrangements outside, and in contradiction, to the provisions of the GATT. Although the total number of such kind of arrangements is not known, their number must be very high.[13]

During the negotiations, many developed countries argued that their governments would more willingly accept wide-ranging trade liberalization if safeguard measures could be taken selectively. The developing countries—as the main targets[14] of these restrictions—strongly opposed that, because selective applications might allow easy, arbitrary and discriminatory establishment of trade barriers.

The controversies could not be resolved by the end of the Tokyo Round.

After many and unsuccessful negotiations, by the decision of the CONTRACTING PARTIES in November, 1979, a GATT Committee was established to continue discussions and negotiations with the aim of elaborating supplementary rules and procedures regarding the application of Article XIX. The negotiations are still in process. The unresolved safeguard issue points out a very serious problem showing the reluctance of the "traditional trading nations" to recognize the necessity of structural adjustments. Instead of adjusting to the realities, and respecting the competitive advantages of the newcomers of international trade, they choose the easier and less painful solution for the short term, i.e. they restrict the "dangerous" imports, *inter alia,* by safeguard measures and for internal political reasons, they refuse to carry out the necessary changes in the structure of their economy. Whatever the final result of further negotiations will be, it is sure that it will considerably influence the trade order of the eighties.

Not to mention the unresolved questions of quantitative restrictions and some other serious problems, the agricultural negotiations in the Tokyo Round were not successful either. The roots of the problems concerning trade in agricultural products are well-known. The USA, as earlier, felt that agricultural and

[12] For details see: ROBERTSON, D.: *Fail Safe Systems For Trade Liberalization.* Thames Essay No. 12. Trade Policy Research Centre, London, 1977. pp. 11–72.

[13] According to an author the accumulated number of export restrictions applied by Taiwan, Columbia and South Korea jumped from 4 in 1971–73 to 100 in 1974–77. CURZON PRICE, V.: *Surplus Capacity and What the Tokyo Round Failed to Settle,* World Economy, September 1979. p. 310.

[14] The proliferation of "voluntary" export restrictions against the exports of developing countries was predicted already in 1971. CURZON, G. and CURZON, V. *The Management of Trade Relations in the GATT,* Reprinted from Vol. 1. of International Economic Relations of the Western World 1959–1971. Edited by Shonfild, A. The Royal Institute of International Affairs Oxford University Press. pp. 275–276.

industrial products should generally be treated in the same way. The EEC took a different view and wanted to separate the agricultural questions from the other ones. The EEC thought the stabilization of agricultural trade should be achieved through commodity arrangements and the preservation of an effective common agricultural policy.

The controversies between the EEC and the USA explain why the results in the agricultural field (tariff reductions on 25 per cent of world trade in agricultural products, international arrangements for meat and dairy products) were not satisfactory to many contracting parties. That is why the CONTRACTING PARTIES have kept on the agenda of the GATT, along with some other unresolved issues, such as the structural adjustments and export restrictions, the question of agricultural trade in the post-MTN period.

Conclusions

What seems to be evident, after finishing the Tokyo Round, is that the whole international trade order is undergoing great changes. We are witnessing the break-down of the so-called GATT-IMF system and the emergence of some new tendencies.

Economic history shows us well that international trade does not know eternal rules either. Following changes in the economic and political structures, the international trade order, too, should accommodate itself to the new requirements. It is clear that trade rules satisfying the needs of a prospering and rapidly growing world economy, led by some "traditional trading nations" (between 1945 and 1973) cannot be left unchanged if unfavourable economic conditions dominate (after 1973) and in some trade sectors vigorous new nations have been challenging the old trade hierarchy (gradually, but especially during and after the sixties).[15] What happened to the trade order is a more or less necessary consequence of all that has happened during the last thirty years in world economy.

What are the major changes in world economy and in world trade order?

1) *Growing need for cooperation*

During the period, 1948–1973, aggregate world production was increasing at an average annual rate of about 5 per cent. At the same time, the volume of world trade was expanding at an average annual rate of 7 per cent, sixfolding the world trade's volume by the end of the period.[16] As a consequence, economic interdependence of nations was considerably increased as well. The participants in international trade, through the recognition that the economic measures of one country greatly affect the interests of other countries, became aware of the need to increase international cooperation in trade matters. This development challenged the traditional "freer trade" or non-governmental approach which attempts to create international rules designed generally to minimize government interference. According to the view of professor *J. H. Jackson*, the original GATT reflected the "freer trade" approach; "whereas in the MTN Agreements, different Codes seemed to take differing approaches. Some of the Agreements seem designed to establish new mechanisms through which governments and international bodies can manage trade. The creation of new "committees" in many of the Codes leans in this direction. Other Agreements, however, appear to be more in tune with the first approach—that is, with the traditional GATT view—and thus, seem designed to limit further governmental interference with international trade."[17] Though one could discuss at length which one is the prevailing approach, it is

[15] Analyses of the NIC's exports see: LAISHLEY, R.: *The New Protectionism.*, South. October, 1980. pp. 18–20.

[16] BLACKHURST, R., MARIAN, N., TUMLIR, J. *Trade Liberalization Protectionism and Interdependence*, GATT Studies in International Trade, No. 5. Geneva, 1977. pp. 7–8.

[17] JACKSON, J. H.: *The Birth of the GATT-MTN System: A Constitutional Appraisal*, Law and Policy in International Business. Vol. 12. Number 1. 1980. pp. 37–38.

evident that increased economic interdependence has definitely changed the character of trade rules through the establishment of some sort of active co-operation among trading governments. As we have seen the GATT contracting parties have even recognized that behind their commercial policy measures often lurk unsatisfactory national structural adjustment practices. That is why the GATT, through putting on its agenda questions relating to structural adjustments, have taken the first step on the road to deeper and really meaningful international co-operation. (The outcome of this step remains to be seen in the near future.)

But there is one fundamental problem which can undermine the whole development. How to satisfy growing requirements for more international co-operation in a world where countries tend to neglect other countries' interests?

2) *The erosion of MFN*

The unconditional most-favoured-nation principle constitutes a corner-stone of the whole multilateral GATT system. Despite the numerous, more or less accepted exceptions (see regional trading blocks, Generalized System of Preferences or the US-Canada automotive agreement), the unconditional mfn remained one of the most, or may-be the most important basic principle of the whole GATT system. It is a remarkable feature of the Tokyo Round that the erosion of the mfn has become more serious. As we have seen the way in which some countries interpret and implement the Tokyo Round Agreements, the GATT leads away from unconditional mfn. Under this interpretation, benefits, both procedural and material, are extended fully only to code signatories. There are attempts in the US professional literature at explaining this sudden conversion. According to them, one should make a difference between tariffs and non-tariff barriers. While tariff concessions negotiated with principal suppliers could be extended under mfn, without insisting on formal reciprocity, "Quite different perceptions prevail with regard to non-tariff barriers. In order to deal with non-tariff distortions, each nation must accept limited international discipline, over measures previously regarded as internal economic policy tools ... the major nations that were willing to accept meaningful international measures demanded that such discipline apply equally to their trading partners. In order to ensure this international *quid pro quo*, the Tokyo Round established the principle of conditional MFN as the centre-piece of its work."[18] Those who would like to prove that the GATT rules, and primarily, para. 1 of Article I, cover only tariffs do not have an easy task. The first contradiction comes from the language of Article I and from that of the other articles of the GATT. It is absolutely clear that Article I and many other GATT articles, see e.g. Articles VI–XIV, cover non-tariff measures as well, and strictly prescribe the application of mfn. In addition, one should not forget that the non-tariff measures agreements—which generally merely interpret and complete some basic articles of the General Agreement—are not new phenomena in the GATT system. Or a very authentic argument based on past GATT practice: the old Anti-Dumping Code (concluded during the Kennedy Round) although, no doubt, it was a non-tariff barrier agreement, was interpreted and applied on mfn basis.

To cut a long story short, the emergence of the conditional mfn does not follow from the nature of the Tokyo Round agreements. The reasons for the interpretation indicated above can be found in the changed sphere of interest of some countries referred to, as a consequence of the drastic events on the scene of world trade. Inasmuch as 35 years ago it was in the trade interest of some economically and politically powerful countries to have a GATT with the "absolutely fundamental" mfn clause, to the same extent they are now interested in limiting the scope of mfn to a

[18] HUFBAUER, G. C., SHELTON, ERB J., STARR, H. P.: *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, Law and Policy... Vol. 12. Number 1. 1980. p. 67.

group of countries, excluding others which are considered, e.g. politically undesirable and/or economically dangerous.

As we have seen, the precondition of the so-called "selective" safeguard measures is also the acceptance of the lack of mfn. The issue of selective safeguards is very serious, because the possibility of selective or rather discriminative safeguard actions makes it easier to put off structural adjustments by penalizing the most efficient producers. An author referring to the dangers of selective safeguards rightly said: "To amend the GATT to permit discriminatory safeguards would open the floodgates of discrimination in all kind of circumstances. It would fundamentally alter the nature of the GATT system which, ... is based on the principle of non-discrimination ... In a discriminating trading system market access is not a right to be earned through competition and excellence, but it is up for grabs through arm-twisting, blackmail and favouritism...".[19] In our view of the situation, we are, unfortunately, not in a position to share the optimism expressed by an authority who sees a gradual evolution from power-oriented trade diplomacy towards a rule-oriented approach.[20]

It is clear that the elimination of mfn from the GATT system and its replacement by reciprocity would drastically change traditional GATT relations. The developing countries and the socialist countries have called the attention of the international community to the dangers of this trend. Under pressure from the majority, the GATT CONTRACTING PARTIES, too, have taken a decision reaffirming the existing GATT mfn rights.[21]

3) *Different trade rules for different group of countries*

It is a very significant fact that the majority of the signatories to the Tokyo Round Codes are developed countries. It is not by chance. The Tokyo Round was dominated by these countries, and among them, first of all, by the big three (EEC, USA, Japan). That is why the MTN codes are shaped in such a way as to satisfy, first of all, the trade needs of these countries. This explains why the developing countries criticized so heavily the Tokyo Round already in May, 1979, in Manila, at UNCTAD V.[22]

If we analyze the results of the Tokyo Round, together with other events of world trade, it is not difficult to recognize the emergence of a strong differentiation in the rules governing international trade. There is one set of rules, roughly, the GATT as amended and interpreted by the Tokyo Round for the developed market economy countries. Among themselves, in spite of the difficult economic climate, and growing unemployment, they try to maintain a fair and non-discriminatory trade order, to avoid a risky trade war.[23] Another set of rules was drafted for the conduct of trade with the developing world. Although the Tokyo Round contributed to the further development of the special and differential treatment in favour of the developing countries, it would be misleading to concentrate only on this side of the picture. It is remarkable that, parallel with the hardening of the economic situation in the OECD countries, the number and significance of special export limiting arrangements and measures is rapidly growing. (See: Multi-Fibre Arrangement, "voluntary export restraints", orderly marketing arrangements, safeguard, anti-dumping and countervailing duty actions, etc.) These arrangements and measures have mainly hit the most competitive and sometimes the world's most

[19] CURZON PRICE, V., op. cit. p. 312.

[20] "To a large degree, the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach" JACKSON, J. H. *The Crumbling Institutions of the International Trading System*. Text of a lecture, Trade Policy Research Centre, London, 1977. 20 October p. 9.

[21] See note 10.

[22] MTN Declaration by the Group of 77 *UNCTAD TD/268/add. 1.* pp. 9–14.

[23] LAISHLEY, R., op. cit. p. 20.

effective producers in some sectors, the newly industrialized countries.

The essence of all this: to preserve the old trade hierarchy and to avoid costly structural adjustments. The price: the constant violation of the old rules which, sooner or later, will make its influence felt on relations among the developed countries themselves.

The socialist countries are getting an even more restrictive treatment. For political reasons, their exports are restricted in a discriminatory way, even in cases where their exports do not harm the economy of the importing country.

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No doubt, the international trade order is undergoing a serious crisis at present. Traditional rules are fading, new tendencies are emerging. The increased economic interdependence of the participants of international trade has enforced a growing trade co-operation among them. The great question is how to continue the co-operation, how to rely upon other countries, if all countries follow their own narrow, short-term interests. The attacks on the mfn mark a turning point in trade power relations. Some countries that historically not long ago advocated—from the position of the stronger side—the full acceptance of the unconditional most-favoured-nation treatment, now seem to be going in the opposite direction, replacing mfn by reciprocity and endangering the basis of the whole multilateral trading system. The limited role of mfn could lead to abuse of power and to the breakdown of today's multilaterality. The emergence of different rules for different groups of countries has begun.

But despite all the negative features indicated above, the Tokyo Round cannot be blamed for the crisis situation. On the contrary, it is probable that without the Tokyo Round abuse of power and spontaneity would have played a greater role in the formation of a new trade order for the eighties and this would have caused a much painful shock for world trade.

P. Náray

Legal consciousness in a personally non-interactive professional group

The present research was carried out as part of a long term project aiming at the description of Hungarian legal consciousness. (For earlier publications see Acta Juridica, 19 (1977) 233 ff. and 21 (1979) 431 ff.) The present study is intended to investigate the characteristics of the legal consciousness of a homogeneous, personally non-interactive professional group. The hypothesis applied was that the similarities in the way of life, due to the uniform work-conditions and the relative social status, result in homogeneous legal consciousness.

Sample

The non-interactive professional group selected was that of the *concierges* (US: janitor). The choice was determined by several factors. There is no professional socialization in the profession, there are only limited interpersonal interactions and no tight organizational control. The concierge is an important social element and a symbol for the citizens in Budapest, since the concierge was helping at police-inspections several times in the past. It was supposed that due to this historical fact, an authoritative tendency and a para-official role-self-portrait will be present in their opinions. Last, but not least, there is a new tendency in the profession: a growing number of relatively highly educated young mothers are seeking to become concierges in order to obtain a decent flat. The existence of two distinct groups in the population seemed very promising in testing the hypothesis.

The sample was selected by using a random sample of houses in the inner Buda-

pest area. We have 96 structured deep interviews, representing 9 per mille of the total. 92 per cent were women, with a normal age distribution. The average age exceeds 50 years. Many of the concierges are already retired, nevertheless they fulfil some concierge-activities.

36 per cent are of peasant origin, mainly the elderly ones. They accepted this kind of employment as a means of gaining higher status in society and they were active as concierges at least from the 1950s. The traditional type of concierge is now rapidly replaced by a younger generation with previous industrial and tertiary employments. The concierge as a social-professional group stems mainly from the upper strata of the manual workers. This is clearly testified by the career of their adult children. The majority of these children are skilled workers and 39 per cent are active as white collar workers or intellectuals.

Further analysis confirmed the transitory nature of the concierge's social position. Using a cluster-analysis it was possible to distinguish among family structures on the basis of the relative status distances of the family members. In the greatest single group (29 per cent) the position of the wife-concierge is relatively low and she accepted the job only to give some support to the family's economy. The original hypothesis of the professional homogenity was only partially corroborated. This situation created an even better possibility for the study of the legal consciousness, since it made possible a direct measurement of the professional *ethos* against the background variables.

This professional ethos was influenced by the concierges' work load. Their activities consist mainly of basic services (cleaning) and of the keeping of the public order in the building (silence). The greatest single group considered her role as one of order-keeping. There were signs of poorly concealed status-inferiority feelings. No particular psychological conformism or agression is present in the population according to the result of Rosenzweig's Picture Frustration Test.

The structure of legal conscience

"Legal conscience" was mainly limited to select opinions concerning deviant (law-breaking) behaviour (for the items see Acta Juridica, 19 (1977) p. 233). Using a factor analysis technique the items have shown some differences; some offences were evaluated more as moral wrongs. In order to avoid confusion we used two indicators of tolerance. The 1.8 average of intolerance means that the concierges refused the law-breaking behaviours. The refusal was not significantly higher than that of the manual workers of the same age of our earlier study. On the other hand the morally neutral deviances were considered punishable by law only by 74 per cent. Even moral blaim was limited among those born after 1940. Though the concierges were rather homogeneous as far as tolerance is concerned, it was possible to establish some differences according to their original profession. Those with relatively high status in the family and the originally white collar workers were the most tolerant. The different tolerance indexes unanimously prove that the personal career is the most influential single factor, while the social origin is negligible.

A second index generally applied in our surveys is a conformism index. This index is intended to measure the respect felt towards the supposed solution of the relevant legal rules. The legal conformism is operationalized by measuring the differences in personal judgements and the relevant knowledge of the law. The index measures also the direction of the difference, i.e. whether one is conforming with a supposedly tolerant or intolerant (punishing) law. 27 per cent of all the answers were intolerant-conformist, 18 per cent tolerant conformist. We arrive to a similar result restructuring the index and comparing the present structure only with the answers given by skilled and unskilled women of the earlier study. In the present study 14 per cent of the concierges are nonconformists, 40 per cent show respect to a law that is supposed to be intolerant, 43 per cent show respect to a law that is supposed to be tolerant, while 12 per

cent respect a law which is not characterized by any particular inclination towards punishment. Only the conform intolerants have a particular social background: the individual career (mobility) is significant according to the results of the variance analysis. The respect towards the law as measured by our conformism index was independent of the psychological conformism as measured by the PFT, yet those who show an inclination towards the opinion of a supposed majority are significantly more numerous among conform intolerants.

The motives of the concierges concerning their opinions on the measures to be taken in front of some deviant acts were content-analysed. Three main types of motivation were distinguished: labeling, pondering and moralistic. Pondering (a rational evaluation of the consequences) was characteristic of the evaluation of corruption and deserting one's country, while in the majority of the analysed behaviours labeling was applied.

Conformity alone was not related to the motivation-type of the subjects; otherwise stated, if the evaluation of the deviance is influenced by the law, this is not due to any particular motivation, but to the authority of the law itself. There is, on the other hand a significant relation between a person's motivation-system and her tolerance, at least as far as intolerance and labeling are concerned. The motivational type was strongly related to the background variables: the labeling type persons have, typically, a low status in their family, while a rational approach is very often characteristic of those concierges who have a relatively high family status.

Given the relatively high intolerance observed in the group indicated, previously, the punitive attitudes of the concierges are not surprising. 58 per cent of the answers were favouring criminal sanctions against the deviant acts (the opinions were not uniform, however, as the very high standard deviation (2.08) shows.) Even in the case of the (non-vagrant) slacker, 15 per cent were favouring imprisonment. Given the importance attributed to imprisonment, it was obvious to analyse the function attributed to imprisonment. In order to minimize biases, no alternatives were mentioned to the subjects. The majority of the interviewed concierges had a strong conviction as to the function of punishment, and the functions mentioned form clearly distinguishable cluster-types:

prevention of crime only:	5 per cent
revenge-dominated:	26 per cent
reeducation of the criminal:	44 per cent
no clear idea:	26 per cent

The concept of punishment turned to be a basic structural element of the legal conscience. Those with the greatest respect of the law are significantly more numerous among the partisans for the prevention and revenge. Revenge-oriented concierges are punitive (intolerant), while the "preventives" are not. Those who emphasize the educative function of a prison sentence score relatively low in intolerance. The independence of the indexes used is proved by the fact that the prevention-oriented group scores highest on non-punitive disapproval of the deviant acts. The very often used explication, namely that revenge and punitiveness are a psychological function of the personality or an effect of the status-deprivation or cultural deprivation, was ruled out by the lack of correlation with PFT and by the very high (highest among the types) knowledge of the law observed in the revenge-oriented group. Neither signs of authoritarianism (measured on the basis of the concierge's child-rearing ideas) were more often observed in any particular punishment-function group. While many (50 per cent) of the concierges would agree with the internation of criminals to an uninhabited island, 53 per cent would distinguish according to the type of the crime committed or the personality of the felon.

Professional activity and legal conscience

In order to measure the legally influenced behaviour of the concierges an index of professional interference-readiness was con-

structed. The index is based on the answers (and, unfortunately, not the actual behaviour) of the concierges concerning their activity in certain situations that might require their intervention or reporting to the police as in the case of child-beating by the dwellers. Fifty per cent declared that they had been once or more times at the police station to report a deviant or criminal behaviour. The personal interference varies according to the type of conflict. Fifty per cent thought that it is not necessary to interfere when child-beating was done by the parents or at least it is not part of their duty, while only 33 per cent were of the same opinion in the case of wife-beating. The interference index shows great differences in the concierges' attitudes. 17 per cent scored very high on the scale. No significant correlation was observed between the interference and intolerance indexes, and the same can be said about conformism. The legal conscience is not related to the professional behaviour (or attitude), though in this case the professional activity was one of legal character. The lack of influence of the legal conscience (or of that central part which we tried to operationalize) on the behaviour corroborates our theory about the functions of the legal conscience (see Rechtsbewußtsein oder Meinungen von Recht? *Rechtstheorie,* 1981. 1.). It would be erroneous, however, to consider it as a decisive proof, when one tries to prove the *non-existence* of an influence.

Personal interference proved to be only slightly related to the social background variables. The lowest interference level was observed in the group consisting of peasant-descendants. It was surprising to note that the interference-readiness was *not* related to the role-concept of the concierges either.

The surprisingly low acceptance of the supposed legal evaluation of the deviant acts indicates that even in such a particular group as that of the concierges, the opinion, so common in legal theory, that law-observance is due to the authority of the state, which creates the norms, does not prove. In the present survey questions were asked concerning the possibilities and rights of the state to prohibit the sale of alcohol, to ban private cars from the cities and to limit or abolish the institution of divorce. Only 14 per cent of the sample accepted the regulatory rights of the state in all the above cases, while 28 per cent thought it inadmissible. 64 per cent considered the prohibition of the sale of alcohol as part of the rights of the state. (It is perhaps influential that 17 per cent of the sample reported problems in the family due to excessive alcohol consumption). Nearly the same amount of the concierges thought it acceptable to ban the cars from the cities, though half of the sample considered the increase in the number of privately owned cars pleasant, while fifty per cent considered the ban as reasonable. As far as the divorce is concerned, the sample was very critical. 84 per cent were aware of the increase in the divorce-rates and thought it was intolerable. 61 per cent had even some suggestions what should be done against the tendency. (They suggested a more restrictive marriage procedure and also restrictions in obtaining divorce). The abolition of divorce, however, was accepted only by ten per cent, yet even in this case 37 per cent thought that the state has the power to do so. Though there is no reason to believe that the concierges do not accept the rules stemming from the state bureaucracy which is in direct contact with them, the state as an abstract entity is not very authoritative for many of them. The conformism indexes were not correlated with the index created on the basis of the acceptance of state authority.

The differences observed in the acceptance of state authority are due to the differences in the background variables of the group. The similarities towards the administration due to the concierges' professional duties did not make their attitudes uniform. The concierges with relatively high status in the family are more inclined to accept the omnipotence of the state. A tentative explanation of this phenomenon may be that people in lower positions are attached to some traditional system of values. The lowest observed average acceptance was 1.85. This characterized the group of those non-peasant descents who entered into the service before 1957, while the highest average was observed in the group of

peasant descents with the same amount of professional experience (5.27; the theoretical maximum being 10).

The need for administrative-regulatory intervention

In connection with the acceptance of government intervention in certain fields of private and public life the subjects were asked about the efficiency of the administrative solutions. The problem is of particular importance since administrative solutions to social problems which mainly recreate the original problem in another dimension, often refer to the expectations of the public opinion. As far as the concierges are concerned, they agreed with the increase of the price of alcohol (a measure taken half a year before the survey), though only 10 per cent considered that the solution was efficient. 62 per cent thought that a further increase would be necessary, without, however accepting complete prohibition. 17 per cent thought that such a measure would result in riots, 32 per cent were of the opinion that teetotalling is impossible because of illegal destilleries. The same doubts were expressed about the prohibitive solution of traffic problems. As far as divorce was concerned, 33 per cent expressed at their own initiatives, that a restrictive plan would decrease the number of divorces, and 75 per cent agreed with a suggested restriction when entering matrimony.

An additive index was created to measure the need for administrative regulatory intervention. 40 per cent scored higher than the mid-point on the scale. A significant relation was discovered between the index and *conformist-tolerance*. As there is a relationship with the acceptance of the state's authority, it is not surprising that the same social background variables are influential in this case too. Motivation too seems to be related to the acceptance of administrative solutions; pondering persons are very wary to accept administrative restrictions. Labeling motivation, however, is related only to a certain extent to the acceptance of the administrative solutions. This is perhaps the case because labeling expresses a stereotype approach and in some cases (as in that of divorce) this becomes a hindrance to *any* change of the existing and established practice and custom.

Divorce

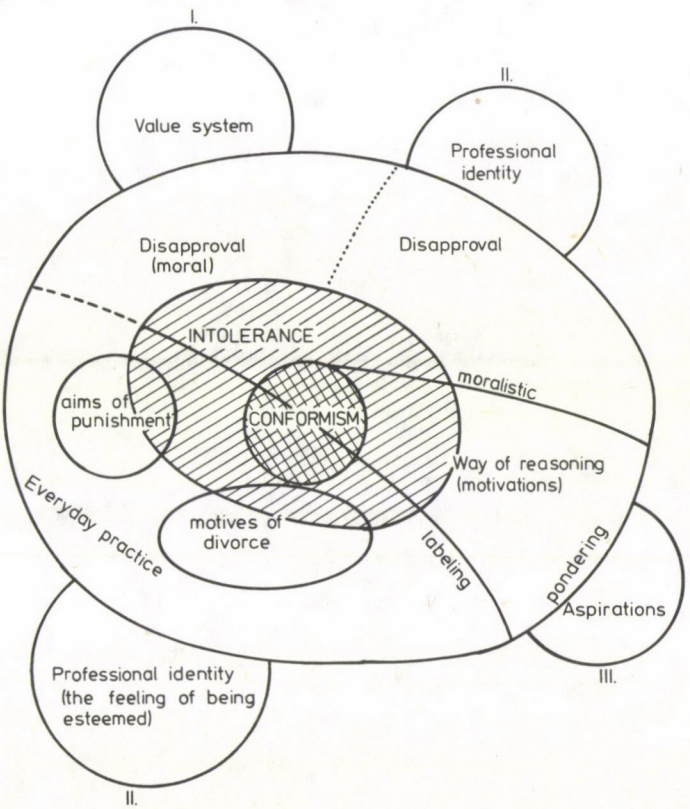
The present study was mainly concerned with behaviours which are regulated by the criminal law. But even if one confines oneself to reactions to the deviance, one should consider behaviours and attitudes not governed by criminal law. Partly following the logic of other questions and partly to overcome this difficulty, part of the interview was devoted to the problems of divorce. 50 per cent of the concierges considered the divorce resulting from the ill-considered behaviour of the youth. 39 per cent of the sample had some kind of personal experience of divorce. Though mostly partisans of a restrictive divorce practice, 63 per cent were against the prohibition (inadmissibility) of divorce because that would not change the fact of separation. Another 22 per cent were against it because it would be harmful to the children. The main serious cause of divorce acceptable for the concierges was habitual drinking (54 per cent) followed by neglect, emotional problems, maltreatment. The combination of the causes as established by the cluster-analysis is the following:

emotional problems and maltreatment	7%
alcoholism and immorality	48%
alcoholism and emotional problems	7%
alcoholism and neglect	20%
all causes mentioned	18%

These types were not differing from each other according to the analysed components of the legal conscience. This is supporting the thesis that "legal conscience" is mainly a juristic-speculative construction, which is not a (relatively) homogeneous structure of the human mind. The above types are not unrelated or incidental: they are in a significant relationship with (psychological) conformism.

Is legal conscience related to the value-structure of the conscience?

The observed discontinuities of the supposed legal conscience raise the problem of the structure of the analysed elements and that of the attitudes. In the present study we tried to establish the relation between the value-system of the individual, or the professional group, and the legal opinions. The lack of an accepted and validated value-test in Hungary made our efforts tentative only. We limited our efforts to the study of three value-reflective everyday activities: professional aspirations (both personal and towards one's children), the characteristics of the "good dweller" and values in child-rearing. Three groups were established after the content-analysis (the technique used was clustering): "honesty and family" as main values characterized 68 per cent, 13 per cent chose as leading values the "work-honesty-family" trinity; the rest of the responses was too heterogeneous to be considered as a group with similar values. The value-system was significantly related to the feeling of being professionally-socially recognized. Those with low self-esteem (based on work) scored high in disapproval and intolerance, yet there is no linear relationship between self-esteem and punitiveness, which suggests that punitiveness cannot be considered as a purely socio-psychological variable.



I-III: operationalised values
legal consciousness as operationalised in the present study

The value-system clusters were unrelated to the indexes of legal conscience, with the exception of the disapproval index and the clusters formed on the basis of answers on serious causes for divorce.

The above indicates that the legal conscience is only indirectly influenced by the value-system of the individual, even in the case of a shared value-system of a profession. The work-oriented group had the lowest deviance-disapproval average, while the group without a definite value-system scored highest on this scale. This indicates that without a firm value system there is a tendency to a non-discriminative negative judgment of the uncustomary or deviant. For instance, the function of punishment is not related to any values within the limits of the present study. The following hypothesis can be outlined: the legal conscience is partly an autonomous part of the conscience, though its extension is more limited than supposed by many theories elaborated by legal philosophers and sociologists of law. The value-system influences directly some peripheral or everyday spheres of the "legal conscience", as it was clearly demonstrated in the case of divorce. Based on the relation between aspirations towards the sons' careers and the motivation, it was also established that the lack of a firm value system increases the chances of a relatively autonomous legal conscience. Otherwise stated, those who desire that their sons become white collar workers are inclined to labeling, while those without clear aspirations are pondering.

The above model resumes the hypothesis elaborated in the present study on the relation between the "legal conscience" and some other elements of the conscience.

A. Sajó

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AARNIO, AULIS: *Denkweisen der Rechtswissenschaft*, Springer Verlag, Wien–New York, 1979. 246 p.

The legal cognitive activity in terms of legal dogmatical work probably does not meet the criteria of scientific cognition, whatever should be meant by that. Cognizing legal rules is, therefore, often considered as social technics, respectively knowledge concerning that. As a matter of course, such a conclusion postulates some well definable measure of science to exist. Science means, first and foremost, cognition. From this point of view it is expedient, first, to be fully avare of the preconditions of cognition. Following *Kaila*, Professor *Aarnio* of Helsinki in this powerful and systematic reconstruction of the legal science (or a possible legal science) regards the immutability, systematizability (based upon recurring) and the conceptual approachability of the object of observation as such preconditions. The existence of the preconditions of cognition does however, not warrant the veracity of knowledge. Jurisprudence (legal science), respectively the theory of law *(Rechtslehre)* endeavours to be scientific cognition fundamentally in terms of verification. But Aarnio sees very correctly that jurisprudence does not fulfil the requirements of veracity, according to any of the different criteria.

Over and above the contents of knowledges, the other fundamental problem from the point of view of cognition is the source of obtaining knowledge. Aarnio takes a strong stand against the positivistic conception of cognition, especially against the view regarding the cognition of exact sciences as the exclusive method of cognition. He thinks the mistake in this case is methodological naturalism. After the justified criticism he essentially adopts the Kantian preconditions of cognition.

According to Aarnio, the traditional jurisprudential research may be led back to two fundamental problems, *viz.* on the one hand, to the construction of legal concepts, respectively to systematizing legal definitions by means of these concepts, and on the other hand, to elucidating the contents of legal definitions, i.e. to interpretation. This is also denominated legal dogmatics and this is what Aarnio further on analyzes. Consequently, the task and subject of this *Rechtslehre* are systematizing and interpreting legal rules. Performing this restriction, Aarnio has no doubt about not having modern jurisprudence. Modern legal science takes into consideration the realization of legal rules, the evaluation of existing institutions and the problems of legislation. But these phenomena are excluded from Aarnio's inquiry concerning the scientific quality of jurisprudence.

Under the above, rightly applied restrictions the subject of legal research will be the legal norm. As far as the existence of norm is concerned, the author takes the view that only the source of law, as a printed text, as an alternation of black and white spots may be characterized as factual (empirical) existence. On the contrary, norm seems to be unattainable, like *fata morgana* hiding from you, when you try to catch it (p. 46). Between the statement of norm *(Normsatz)* and norm, however, there is the statutory provision duly enlightening the contents of the norm. The difficulties of legal interpretation appears first, if the wording of law is not clear or if it has various meanings. Accordingly, *Rechtslehre* becomes hermeneutics, and Aarnio leads also the legal systematizing back to interpretation, or to be more precise, he points out that systematizing and interpretation are interdependent. Elucidating the contents of legal definitions is the core of

Aarnio's *Rechtslehre* and book. Interpretation means fundamentally the possibility to find certitude conceived in non-positivistic sense and the designation of the methods of its finding. The author endeavours to take into consideration the basic types of procedures followed in practice (games of language).

Having analyzed the problems of interpretation of technical norms, Aarnio deals with interpretation, more properly intended, i.e. the choice among several interpretational alternatives. In the course of choosing fundamentally one of the types of research activity is realized, *viz.* when efforts are made in order to verify a given result. The peculiarity of this content-analysis consists in the lack of relevant procedural instruction (command). In a certain respect practice itself decides whether or not to follow a given procedural (verificational) model. The aim of the analysis is not to transform *Rechtslehre*, it only endeavours to obtain a technical norm by restricting the contents. Consequently, the very meaning has to be found which ensures that the given method of procedure is the correct one. As a matter of fact, verification means to find adequate arguments. There is, however, no uniform argumentational system and rule: Aarnio speaks about very different argumentational games. The argumentative bases cannot be founded upon intuition. On the other hand, argumentation relying upon authority is not a sufficient reason for accepting arguments. Even authority itself has various meanings in legal interpretation, as there is a significant difference between the prestige of state organs and the reputation of scientific opinions, even regarding their argumentative power only. In the legal community, however, each legal standpoint forms an argument merely by virtue of its existence. But this is not enough for the foundation of arguments and sense explanation, even in the case of the so-called predominant opinion. All the more as even the nature of predominant opinion is problematical. By all means, the authoritarian argumentation is superior to the intuitive one so far as the preceding one is at least publicly founded. When, however, the substantiating chain reaching the authority breaks, we get very near to that, what in the course of referring to intuition is happening. The other party has namely no possibility for argumentation. That is why the so-called open argumentation is accepted by the author.

According to the guiding principle of the book, the criterium of legal veracity is to advance valid arguments according to the consensus of a definite audience (auditorium) and to apply these in conformity with definite rules. After all, legal reasoning consequently depends on the consensus of the relevant public. This supposition is, on the one hand, valuable as it gives way to the social background and it takes into consideration that rules always regulate in social sense. On the other hand, however, it does not give direction in the question of the conditions of the consensus. The audience can otherwise be of any composition but communities like e.g. judicial or jurisdictional ones are obviously of special importance. Theoretically, however, the whole society can constitute the audience. Although, if there is not other criterium verifying the correctness of a legal interpretation but the assent of the audience, i.e. the methodology of *Rechtslehre* does not constitute a closed system of rules ensuring correct interpretation of legal texts on the other hand, according to Aarnio, the possibility of rational argumentation remains (at least to a reasonable extent) in *Rechtslehre*, too (p. 122). According to Aarnio, that is made possible by the fact that every person taking part in the legal community has *a priori* given idea concerning a "natural order". The elements of this presupposition system can theoretically be elaborated and they can be made explicit. Although the cultural community conceived in a sociological sense provides certain guaranties on the fidelity of the knowledge based on auditorial consensus, this fidelity criterium seems to be simply irrelevant from the point of view of logical investigation. It would be more convincing if the author would argue with the social needs of consensusformation.

In a book treating the scientific quality of *Rechtslehre*, respectively that of jurisprudence neither the analysis of inductivity (regarded as a fundamental in the positivistic conception of science), nor that of foreseeability connected with that can be missing. Induction in legal science

is impossible. While in the natural sciences it may be presumed that invariance is effective, i.e. in an unknown case the same behaviour can be expected as in a well-known one, as to law, this is not the case. Although it is not impossible to give prognosis concerning law, as emphasized in American and Scandinavian realism, this prognosis considerably diverges to the so-called prognosis of natural sciences. (And, accordingly, jurisprudence conceived in this sense does not fulfil the positivistic requirement of science either, *viz.* it lacks of capacity to give considerably probable prognosis.)

According to Aarnio's conclusion, it is the research activity that can be compared with *Rechtslehre*. In the course of research methodological verifiability and a definite level of systematizing are required. As to *Rechtslehre*, the former is given in the course of interpretation, while the latter by a system of definitions. According to Aarnio, *Rechtslehre* belongs to those spiritual sciences which do not provide positivistic certainty. There is no special procedure of *Rechtslehre*. According to Aarnio's second conclusion, the level of systematization determines to what extent research is theoretical. The greater part the system has in *Rechtslehre*, the more important are theoretical statements.

A. Sajó

GRIFFITH, ERNEST S.: *The American System of Government*, Methuen and Co., London, 1976. 204 p.

The author of the work ran into its fifth edition lectured in 1951–1952 as guest professor in Oxford on the American system of government and simultaneously offered courses on general economic problems at the universities of Birmingham, Manchester, Liverpool and Swansea. The interest was extraordinary, considerable misunderstandings had, however, to be cleared up.

In the foreword the author emphasizes that the American administration is the government of "built in" brakes, which render impossible either for the executive power or for the legislators or courts to gain an unduly high ascendancy over the others. In the brief comments written to the subsequent editions the author touches upon the changes of presidential power during the Kennedy-period, the Johnson and Nixon administrations, and points out that he had to rewrite almost completely the chapter on the executive power because the importance and character of executive power changed so much. Although the so-called "Imperial Presidency" was somewhat relegated into the background by the retirement of Nixon, it is not to be questioned that the executive power will become rather stronger than weaker in the eighties in the United States.

As against the British system of government, the American system is less suitable for being summed up. It relies upon the written constitution and upon its amendments and these rules bind the administration which, due to its federal character, performs only a part of the state tasks, the other tasks are to be performed by the individual states and by the local administration. It is an undeniable fact that—like according to the British system—also in America the majority of essential legislative steps are initiated by the executive power. In England all statutory provisions are of the same rank (excepted when the ministerial decisions are taken for being of lower rank) whereas in America, all laws shall conform to the constitutional norms. The constitution separated the spheres in which the federal administration may function, in which the state authorities may perform their tasks and in which the local authorities may work. The constitution designates the most important bodies and offices of state apparatus and tries to counterbalance the executive power and legislative power. It devolves on the Supreme Court to decide what the government can and cannot do and, in this respect, the

Supreme Court interprets the law on the highest level. Therefore, those studying the American system of government shall pay a special attention to the activity of the Supreme Court.

First, the author deals with the American constitution which originated in the spirit of "natural law" theses of Locke and Montesquieu two centuries ago, and the most important provision of which said that the United States of America should be considered a homogeneous nation and not a loose confederation of states. The book deals also with the history of the constitution and investigates how the American constitution changed during the history due to amendments and interpretation. Beyond doubt, the provisions relating to the rights of the coloured minority rank among the most essential complementary provisions to the constitution.

At the beginning of the history of the United States the loyalty to the individual states was stable. In the early years of the 19th century Chief Justice John Marshall, relying upon the reputation of the Supreme Court, intensified the conception of uniform nation. The victory of president Lincoln in the civil war settled the question of federation or confederation. Perhaps the complexity of economic and social problems and their increase and development at an unprecedented rate enforced primarily that the most important problems require today national solution. In the original text of the constitution almost no instruction relating thereto is to be found.

The author deals also with the questions of the organization and election of the Congress. He stress the important role of the Senate in the ratification of conventions and in the appointment of persons proposed by the president. These persons—e.g. lately General Haig, Secretary of State—have to get over the "question-barrage" of the members of the senatorial sub-committee.

The work treats in details the system of electorate, its anomalies, as well as the sphere of authority, role and activity of senatorial commissions and of those of Congress. It points out that the legislative assembly exercises its power primarily through these numerous commissions. Then, the procedural order of Congress is dealt with, which is regulated by paragraph I Article B of the Constitution, completed by several further rules. The chairmen of commissions were appointed up to the recent years on the principle of seniority, since 1975, however, a change occurred in this field.

For the most Europeans it is a puzzle, how the Americans elect the President. James Bryce has ironically written: "Why great men cannot be elected president?" Indeed, looking over the two centuries of the American history, it may be stated that numerous great politicians or at least several excellent administrative experts never reached the White House.

The work offers a brief survey on the development of the system of presidential election, on the evolution and decomposition of "political coalitions". The latest successful coalition of this kind, the "coalition" of democratic electors of the Northern and Southern states was prospering during F. D. Roosevelt's term of office, during Johnson's Presidency (after three decades) it came to a crisis and in our days it stopped to exist or at least it died a political apparent death. The work points out that the extent to which the presidents wielded the power assigned to them by the constitution depended in addition to their own talent and character considerably on the situation in the internal and foreign affairs. The work deals with the self-righteous behaviour of state bureaucracy and with the proliferation of institutions created by the presidential power which characterized especially the sixties. A separate chapter treats the means of international policy, the part played by the legislative assembly in the development and direct management of the long-range priority of foreign affairs.

Last but not least, the work enumerates the complex tasks of the local government and treats more detailed the tasks of town agglomerations.

M. Udvaros

Stát a právo (State and law). Praha, Academia, 1979. 312 p.

The present issue of this annual collection of studies contains exclusively papers on the protection of the environment.

The first study, *Z. Madar*'s "Basic problems in the legal regulation of the protection of environment in the socialist countries" is of a comparative law character. The author surveys the positive law of the environment protection in the European socialist countries taking into consideration statements of major importance in the legal literature, too (pp. 5–82). The author pays attention, first of all, to the fundamental problems of the protection of environment by the socialist state. He points out that the environment protection is of society-wide importance. It is a subject of investigation by different disciplines as problems are of comprehensive character and so they require global solutions. The role of law, its possibilities and limits in the protection of the environment are dealt with. In the followings the author treats the relating legal regulation of Czechoslovakia, the Soviet Union, the German Democratic Republic, Hungary, Poland, Bulgaria and Rumania. He comes to the conclusion that the protection of environment is a special function of the socialist state. Its legal regulation cannot be assigned to a single branch of law. More than one answer is given in the legal literature to the question whether the environmental law should be regarded as a separate branch of law. As to the nature of the comprehensive norms regulating environment protection there are two ways of solution. One of them would be the codification of the legal material as the case was in the fields of the civil law, labour law and criminal law. This form of legal regulation involves the disadvantage that due to the rush changes in technical and economic conditions it would require frequent amendments. The other way is to enact a comprehensive statute setting forth the broad objectives only which seems to be more convenient with regard to the character of the material. On the one hand, it makes possible to sum up all the main principles concerning the protection of environment, and on the other hand, it offers sufficient scope for regulating the particular problems with rules of executive character. Finally, the author offers a proposal on the structure of the would-be Czechoslovakian statute by setting forth its broad objectives and on the basic problems to be regulated by this law.

The second study entitled "Protection of the environment in the regional planning and in the building administration" has been written by a team consisting of *M. Hegenbart, E. Kružiková* and *E. Adamová* (pp. 83–114). As a preliminary, the attention is directed to the material connections between the regional planning and the building administration. After this the views concerning certain problems of regional planning and the rules related to building activity are expounded. In the followings the authors write about the present-day legal regulation in three chapters (common problems, regional planning, administrative activity related to building). Finally, they sum up the conclusions. In their opinion, the effectiveness of the legal means of the administrative organs and especially those of the national committees has recently been significantly increased, due to the consolidation of regional planning, the increasing importance of the protection of environment, the accommodation of the regional planning documentation to the methodics of national economic planning, the more effective extension of regional, building and colaudational procedures over the environmental supervision, the consolidating position of state organs safeguarding the protection of particular components of the environment and, finally, the increasing of sanctions against the citizens and organizations.

The third study, *G. Přenosil*'s "Protection of the environment and criminal law" devotes attention to the role of criminal law in a more effective protection of the environment (pp. 115–140). First of all, the author describes the possibilities of criminal law related to the protection of environment, after this he surveys the institutions of criminal law being, in his opinion, usable for environment protection. A separate chapter is devoted to the penal

legislation of the European socialist countries concerning the protection of environment. Then the most important features of those are made known. The author's conclusions relating to the ways of the criminal law protection of environment may also command interest. Finally, the author offers concrete recommendations for the legislation and practice, with special regards to the development of Czechoslovakian law.

The fourth study entitled "Administrative protection of environment in the territory of Czechoslovakia in the epoch of the capitalism" has been written by *L. Bianchi* (pp. 141–168). The author looks back at the protection of particular components of the environment in the past. Thus, the beginnings of the protection of human health and that against air pollution are dealt with and also the protection of the soil and the protection of the water are treated. After this, further rules having indirectly or directly contributed to the protection and the formation of the environment are exemplarily expounded. These rules in most cases regulated certain activities in connection with production, building, traffic etc. As a summary, the author points out the main features of the rules of the bourgeois states in general concerning the topic. After this, some remarks are made on the present-day position of the environmental legislation.

The fifth study, *G. Mencer's* "Protection of the environment with respect to the Helsinki Conference and the disarmament proposals" (pp. 169–195) draws attention to the necessity of international co-operation at various levels and in different forms in order to carry into effect the protection of environment. The author refers to the Stockholm Declaration in summer 1972, in which the necessity of the international co-operation was pointed out and to the Helsinki Final Act in 1975, which paid a special attention to this problem. The author deals with the principles of international law to be followed by the states in the co-operation for the protection of environment and exposes the legal principles of the developing co-operation. The Helsinki Final Act does answer these questions in more than one passage, according to the author. As to the socialist countries, the integration trend in the protection of environment can unambiguously be observed and is expressed by a number of documents, agreements, institutions and organs. The author gives a detailed account of the environmental activity of UNO. Finally, the attention is directed to the destructive effect of armed conflicts for the environment.

The sixth study entitled "The development of the international law regulation of the protection against the pollution of the sea environment" has been written by *V. Kopal* (pp. 197–310). The author analyzes primarily the notion and the types of the pollution of the sea environment. After this he treats the special international regulations concerning the particular types of pollution. Then the attention is directed to the efforts in order to regulate the protection against the pollution of the sea environment comprehensively. Finally, the author points out the significance of the international protection of the sea environment against pollution from the point of view of the development of international co-operation.

All studies are supplied with an English résumé opening them up for the foreign reader, too.

L. Trócsányi

Социализм и охрана окружающей среды. Право и управление в странах-членах СЭВ, (Socialism and environmental protection. Law and administration in the member-states of the CMEA), Edited by KOLBASOV, O. S., Moscow, Yuridicheskaya literatura, 1979. 392 p.

This book is a result of the teamwork of eminent experts at environmental law in Bulgaria, Hungary, the GDR, Poland, the Soviet Union and Czechoslovakia (T. Lyalev, A. Tamás, E. Ehler, K. Becher, L. Lustacz, O. S. Kolbasov, A. V. Leontyeva, V. L. Mishchenko, Z. Madar, G. Menzer, P. A. Tokareva). Not speaking of its informative and scientific value, the

significance of this work can be characterized by the fact that it is in itself a part of the co-operation of CMEA states at environmental protection, i.e. of a system of relations, without which regional environmental protection or even the economic co-operation of socialist states would be unthinkable.

In the first part of the book solutions in the environmental protection of the national legal systems are summarized, in the second one the administrative activity of the states in connection with environmental protection and in the third part the co-operation of the CMEA countries at environmental law and the legal problems of the common protection of the environment are discussed. The elaboration is all the more valuable as the reader would find no national essays following each other but national solutions are analyzed according to a certain system, in thematic grouping. This solution involves, undoubtedly, certain risks as the structural relations of the national legal systems may easily be disregarded and so a false opinion may be formed, but considering the intention of the book, this structural solution is undeniably the best. At the same time, this structure in some instances definitely seems to be an artificial skeleton, not suitable for each legal system. E.g. writing about the constitutional foundation of environmental protection the citizens' right to appropriate environment and their obligation of protecting it are mentioned. The scrutinized constitutional provisions handle sometimes the concerning right, sometimes the obligation only, in most cases, however, not even the right to appropriate environment is expressly declared by the constitutions.

In Chapter One of the book the connection of environmental protection and law is analyzed in general, with special regard to environmental policy, the notion of environment, the principal trends of its protection, and to the socialist principles of environmental protection. The socialist unity of environmental protection is assured by the essential conformity of production relations and by the planned economy prevailing equally in each socialist country. At the same time, the authors write also about the specific principles of environmental protection being characteristic of the regulation governing the environmental protection of each socialist country, too. The safeguarding of human health and welfare stands in the limelight of principles. But principles of different character are also included in the relating specification which should be rather qualified as those on organizing and regulation methodics. Such are e.g. the principle of complex approach and that of continuous control of power sources. Another cardinal question of the theory of environmental law is the legal notion of environmental protection. According to the standpoint set forth in the book the law in environmental protection becomes means of environmental protection as the most effective regulator of social conditions.

Surveying the national legal solutions in thematic order, the book sets out from the constitutional fundamentals with special regard to the citizens' rights related to environmental protection. Complex environmental protection laws as bases of the special regulation concerned are discussed in a separate chapter. There the connection between the mentioned acts and the branch legislation is analyzed, then an optimal model of environmental regulation is outlined. This model postulates close connection with the branch regulation, therefore, according to the authors of the book, the special part of the model act can be passed over. At the same time, ecological requirements should prevail in each branch of the national economy.

In the course of surveying the provisions regarding soil, water, forests, atmosphere, biosphere, the protection of surroundings and historical relics are separately discussed. The authors deal also with problems related to harms resulting from technical improvement (noise, vibration, radiations, etc.). Of increasing importance is the prevention in the course of regulating. Environmental protection narrowed down as a legal problem cannot be solved. Being actuated by this perception the authors of the book scrutinize the means and safeguards bringing environmental regulation into effect. Here the concerning planning process is reviewed and numerous interesting data about the financing of the environmental protection and about the related scientific research are reported. A separate subsection deals with the educational activity on environmental protection.

As far as the forms of calling to account for breach of environmental requirements are concerned, the criminal, administrative and civil responsibility are to read. It deserves attention that the liability of legal entities is known in the administrative forms of environmental protection of some socialist countries. Surprisingly, the solutions falling under domain of labour-law liability are missing.

Part Two of the volume treats the state control and management of environmental protection. This state activity is realized in the spirit of democratic centralism. The authors examine organs performing environmental protection and elaborate principles of their classification. The role of central and local administrative organs is specially discussed. The problem concerning the possibilities of social organs, respectively those of society to join in environmental protection activity is scrutinized in an exceedingly long chapter.

Part Three of the volume deals with the co-operation between CMEA countries. After a historical conspectus and the establishment of principles the problem of organization forms is thoroughly analyzed. From the point of view of elaboration the question of co-operation is made more involved by the fact that besides the multilateral co-operation within the CMEA the bilateral conventions between particular countries, respectively the factual co-operation executing the conventions are of not negligible significance. Remarkable is the outlook in Chapter Twelve. Here the problem concerning the influence of environmental protection activity of socialist countries on the international legal regulation regarding the world's environmental protection is analyzed.

A further help is offered to the reader by the Appendix publishing the most important acts of environmental regulation of the member-countries of the CMEA and by the schema of a complex environmental model-act in short-term as well as in long-term variants.

A. Sajó

Deutsches und sowjetisches Wirtschaftsrecht. (Studien zum ausländischen und internationalen Privatrecht. Heft 4.) I. C. B. Mohr, Tübingen, 1981.

The texts of the lectures and discussions of the first Soviet-West German legal symposium have been published under the above title and with the same contents both by the Institute for Political and Legal Sciences of the Soviet Academy of Sciences and by the Max Planck Institut für ausländisches und internationales Privatrecht in Hamburg. The German edition was redacted by *I. P. Wähler*, while the Russian version was prepared by an editorial board consisting of four members *(Abova, Boguslavsky, Laptyev, Ribanov)*. This symposium took place in October 1979 and dealt with questions of economic law. The second symposium will be held in Hamburg in May 1982, and according to the agreement of the parties the economic law character will be kept.

The lectures given at the symposium can be divided according to four subject matters. Within the frames of the first subject matter the legal status of the enterprises was discussed, the second subject matter was the connection between plans and the contractual relations among the enterprises, the third comprised the legal problems of the industrial, technical and scientific relations between the Soviet Union and West Germany, finally the international arbitration made up the fourth subject matter. The appendices of the volumes embrace the treaties and other legal documents concerning Soviet-West German economic co-operation.

As to the first subject matter, two lectures were delivered on both sides. In his lecture on the state enterprises and the industrial associations respectively combinates Professor *V. V. Laptyev* dealt fundamentally with the relating Soviet positive law. Whereas Professor *B. Grossfeld* from Münster read a rather ideological paper, in which he explained how the role of both the contractor and the ownership fall into the background at the large capitalist enterprises, further that new controlling institutions are established, such as state and mass communication

control in trust law, the consent with the associations for the protection of common interests and the employees' participation. Grossfeld's lecture on enterprise constitutional law was—obviously by courtesy—not disputed on the Soviet side, but one of the West German delegates, Professor *N. Reich* from Hamburg, who is well-known for his left social democrat views, called in doubt if such a harmonical co-operation can be evolved in the late capitalism among the state, large enterprises, associations for the protection of capitalist interests, trade unions respectively employees, as expounded by Grossfeld.

In the second subject matter three lectures were delivered. *T. E. Abova,* candidate of sciences, senior member of the Soviet Institute for Political and Legal Sciences made known the planning process of the Soviet national economy, the legal form of the plans and their realization in the plan contracts. Professor *I. H. Kaiser* from Freiburg accounted for state interventions in West Germany by the crisis of market-based economy and expounded the principal legal elements of the West German structure policy. Professor *E. J. Mestmäcker,* co-director of the Max Planck Institut in Hamburg (who is incidentally one of the most renowned West German representatives of the neoliberal economic philosophy of law) dealt in his lecture with the contract as the most important means for an enterprise to carry out an independent planning and emphasized the—in his opinion—absolute priority of the freedom of contract and that of the competition principles. In the discussion it was emphasized on the Soviet side that whatever important the independence of the enterprises—based upon the economic clearing of accounts (hozrastchot)—may be, this has to be connected with the priority of the central economic management and the fulfilment of plan tasks.

Lectures delivered in the third subject matter may be of special interest for the foreign reader. These discourses dealt with the legal concerns of Soviet-West German economic relations and contained a number of important economic data. Professor *Boguslavsky*'s lecture surveys these relations in general, with special regard to the private international law aspects. The lecture of Professor *D. A. Loeber* from Kiel (which contains an exhaustive bibliography, too) thoroughly discusses a special sphere, *viz.* the importation of technological equipments from West Germany to the Soviet Union. *K. H. Fink,* Director of the International Centre for East-West Relations in West Berlin elaborated the specialities of the Soviet-West German co-operation and licence contracts.

The most remarks related to this subject matter. So e.g. *M. L. Gorodissky,* from the Soviet Chamber of Commerce dealt with the so-called industrial property, while Professor *A. B. Altschuler* discussed the financial law problems of the co-operation relations. In the discussion also some well-known managers (those of enterprises interested in trading with the Soviet Union) intervened on the West German side, reciting the possibilities of removing practical difficulties emerging in the co-operation—e.g. *A. Steiger* from the Mannesmann Company.

In the fourth subject matter Professor *Pozdnyakov,* who is simultaneously President of the Soviet Arbitration Court, made known the Soviet arbitral experiences concerning east—west economic relations. The parallel of this lecture was delivered by *I. P. Wähler,* Soviet rapporteur of the Max Planck Institut in Hamburg, on the West German arbitral experiences. In the discussion the lectures were supplemented with maritime arbitration by Professor *Lebedyev,* respectively with a few experiences of arbitration within the CMEA by Professor *Usenko.*

There were sixty participants at the symposium, among them the 14 members of the West German delegation. The participants suitably represented the jurisprudence of their countries, a number of internationally renowned scholars took part in the meeting. As explained in the preface of the German edition by Professor *U. Drobnig,* co-director of the Max Planck Institut in Hamburg, the success of the first symposium raises solid hopes that in spite of the meanwhile significantly piled-up political clouds the Soviet-West German scientific co-operation at economic law will be continued.

A brief observation to the review from the Hungarian side. On the financial basis of the Deutsche Forschungsgemeinschaft, making use of the personal relations—established in the

course of preparing the International Encyclopedia of Comparative law edited by the Max Planck Institut—with the academic institutes for legal sciences of the socialist countries and after several Polish-West German symposia, the Max Planck Institut für ausländisches und internationales Privatrecht in Hamburg has now made regular the scientific symposia on economic law also with the Soviet Union. With regard to the very fact that West Germany is the largest capitalist foreign trade partner of Hungary and that the Hungarian jurisprudence has significant dogmatical traditions going back to the German group of laws, the organization of a similar economic law symposium on the Hungarian side should be considered.

T. Sárközy

Verträge in Wissenschaft und Technik (red. OSTERLAND, R.), Staatsverlag der DDR, Berlin, 1980, 303 p.

The collective of the authors at the University of Dresden—under the direction of Professor Osterland—set for themselves an essentially practical aim. The contractual methods play an outstanding role in the organization of inter-enterprise relations and these contracts display, especially in the field of the scientific-technical co-operation, such particular features which—due to the complexity and individuality of these contracts—raise several practical problems. The authors were conducted by the intention to support the contractual practice by the publication of this manual being explicitly practice-oriented but also having a solid theoretical foundation.

The authors treat the subject-matter by building partly upon the effective statutory provisions and partly upon the analysis and the valuation of the contractual practice.

The first part of the work contains the introduction and analysis of the fundamental notions, categories, contract elements and stipulations. Chapter I (pp. 16–25) outlines the functions and the fundamental principles of the contracts entered into in the course of the scientific-technical co-operation. Chapter II (pp. 26–51) offers the interpretation of some basic categories relating to all contracts. Thus, it offers the concise and clear elucidation of the notions and legal norms related to the definition of the subject matter of the scientific-technical services and results, to the scope of the typical contractual partners, to the relation between the plan and the contracts, to the co-operation and co-ordination tasks preceding the formation of the contracts, to the financing, to the fixing of prices, and to the stimulation. The next Chapter (pp. 59–119) treats partly the fundamental features of the characteristic types of contracts and contractual stipulations. Such types of contracts are—without exhausting their scope completely—the research contracts in the strict sense of the word, the contracts for development (directed to the process or to the product), the contracts for projecting and experiments, the contracts related to the standardization and to the technical consultation, etc. Among the characteristic contractual stipulations the work deals with the definition of the quality, the warranties, the intermediate and final terms, the fixing of prices, the delivery and receipt, the warranty for legal defects, the protection, the secrecy, the granting of licence, the penalties and damages, the novation and the extinction of the contracts.

A special interest may be laid on the part of the volume (pp. 120–165) disclosing the problems of the research associations *(Forschungsgemeinschaft)* on the one hand, and of the contracts for domestic exploitation *(Nutzungsvertrag)*, on the other hand. In connection with the first range of questions, the basis of research community and the conditions of its establishment, the relation of its activity to the state planning and management, questions in connection with its functions, with the development of the membership, with its inner organization and decision-making system are analyzed. As for the contracts for exploitation (the terminology of the legal literature of the GDR calls "licence contracts" only the contracts entered into in the international relations), the authors investigate the stipulations of

fundamental nature coming up in connection with such contracts. Thus the question of the gratuitousness and onerousness, the various phases, and variants, respectively, of the exploitation *(Erstnutzung, Nachnutzung, mehrfache Erstnutzung)*, the details of the obligations of information and co-operation, the problems of industrial property rights, the counter-performance, the warranties and the liability, especially the questions of warranty for legal defects.

The second part of the work makes actually available a remarkably detailed and perspicuous check-list for the practice. It surveys the various types of contracts serving for the scientific-technical co-operation, introduces the typical construction of these contracts distinguishing the particular contractual conditions characterizing the individual contracts, and the general conditions of contracts, respectively, as well as the variants and relations thereof. In this part also model-contracts are compiled and elucidated.

The work is well edited, the applied decimal system, the well manageable indices formally, whereas the wide-ranging knowledge of the everyday contractual practice as for the content ensure, that the research and economic organizations obtain a very useful aid by the reviewed book. This aid is, however, not rendered only for the contractual practice of the GDR but offers valuable information also in a wider range, for other legal systems. Neither the theoretical significance of the work may be underestimated. By the delimitation of the various types of contracts, by the analysis of the characteristic contractual stipulations the work elucidates in several respects also the general questions of principle of the law of contract—grounding upon the Antheus' relation of the practice.

E. Lontai

SCHÖNFELD, G.: *Die Zusammenarbeit der Mitgliedstaaten des RGW auf dem Gebiet des Erfindungswesens,* Akademie für Staats- und Rechtswissenschaft der DDR, Potsdam-Babelsberg, 1978, 128 p.

The legal literature of the GDR and especially the Institute for Foreign and Comparative Law of the Academy of Legal and Administrative Sciences of the GDR deals actively and exhaustively with the problems of the legal fields significant both theoretically and practically. One of the recent results of this activity is the book to be reviewed.

The most dynamically developing field of the integration process within the frameworks of the CMEA which attained qualitatively a higher degree especially since the acceptance of the Complex Program, is the scientific-technical co-operation and its integrant field, though displaying particular features, the co-operation in the protection of industrial property. The undoubtedly most important part of this legal field is the system of norms and institutions related to the results of technical development, that is the invention-patent law in a broad sense.

G. Schönfeld, the internationally acknowledged specialist of this field is qualified for the complex analysis of these problems on the strength not only of his theoretical activity but also of his educational, science-organizing work as well as of his experiences gained in the framework of the Legal Conference of the CMEA.

Chapter I of the work analyzes the place of scientific-technical development in the socialist economic integration and the management of this development by the means of law. The author elucidates the role of the scientific-technical development with a general character, and points not only to the economic aspects thereof, but also to its role played in the socialist formation of the man, of the personality, too. He emphasizes that the creation of inventions is a significant factor of the technical progress but—as against the traditional protection-centric approach—he underlines that the analysis has to comprehend also the phases of the creation and utilization of inventions. The inventions mean in the technics the qualitative, the revolutionary changes. The international character of science and technics can really assert itself just on the

ground of the integration, the perfection of common inter-state management of researches is therefore indispensable. The management of researches renders, of course, necessary the consideration of several particular features. From among them, the author mentions the role of the probability, the risk, the accelerated "moral wear" of research results, and just therefore, the significance of the promptness of practical exploitation on a range as wide as possible.

The author analyzes the possibilities and the role of the law, and the legal means in the regulation of the integration process, and the relations developing in the course of it and then specifically in the field of the co-operation in inventions in principle and in a generalized way.He points out the fact that the socialist law has to perform an active and planned organizing function in the interest of producing as well as exploiting the scientific-technical results. (p. 29). The provisions of invention law extend to the conditions of protectability, to the state recognition of the protection, to the rights and duties of state organs and private persons relating to the exploitation and the moral and material stimulation of the creative (inventive) activity. The legal regulation has to reckon with the requirement for the considerable internationalization of the process of the creation and exploitation inventions, with the increasing importance of the common integration interests. These common interests go beyond the frameworks of the individual states which means that the recognition, protection and publication of inventions shall be provided for in all member-states.

After this general approach Chapter II analyzes the concrete questions raised by the development of the integration relating to the functions, the effect mechanism and the development of the protection of inventions. Just in the introductory part of the Chapter the author sharply propounds the most fundamental problem of the examined legal field, namely the contradiction between the inventions being international (on integration level) as for their significance and the territoriality of their protection (pp. 42–45). The raising of the level of the internationality in this field may provide for an effective protection against the disturbing influence of the non-socialist (capitalist) countries and companies, especially that of the multinational companies (this fact is illustrated also by statistical data). The socialist principles of state management in the inventive activity which must characterize also the co-operation in the integration, are formulated as follows: the creation of favourable conditions serving for the extension of inventive activity; utilization of inventions for the benefit of the whole society; the provision for the planned exploitation of inventions as a state function; establishment of protective forms ensuring both the individual and the social interests; protection of the rights of the inventors, their moral and material stimulation (p. 49). In the opinion of the author, the "owner" of the inventions is the state and it must confer its owner's rights of disposal to the other utilizing member-states for the sake of the efficacious organization of the exploitation (this parallel multiple propriety situation is rendered possible by the "immaterial" character of the creations).

In order to ensure the common interest requiring the international multiple exploitation *(Mehrfachnutzung)* of inventions, a suitable collection of legal instruments shall be developed. Therefore, the legal form of the protection may not be based on the exclusive rights. The author outlines the adequate legal grounds and principles which may serve effectively the above requirements. It is particularly the protective form by the inventor's certificate which corresponds especially to them. Although the integration on the field of the protection of industrial property within the CMEA may give account of considerable progress, several legal problems waiting for the solution are still to be found. In this connection the author surveys the significant treaties on CMEA-level (the Moscow treaty, the Leipzig treaty, the Havanna treaty) and outlines the further tasks.

These tasks are set forth in detail in Chapter III. The author analyzes again and more in details the problems deriving from the principle of territoriality, in connection also with the sovereignty. He points to the fact that as against the supra-national solutions, the socialist integration is characterized by the integrated co-operation. With respect to the inventions, a

remarkable role is played here by the co-operation in procedure and examination, the mutual reçognition of protective documents, on the one hand, and the tendency to unify and harmonize the relevant legal norms, on the other hand. Here, the author refers also to the problems of private international law.

Only some ideas of the work elucidating a consistent attitude and being rich in ideas could be flashed. The views of the author display a comprehensive knowledge and convincing arguments which induce the reader to think, even if the reviewer does not personally share them completely (first of all the questions in connection with the priorities and valuation of the protective forms). The specialists dealing with the examination of the essential theoretical—principal questions of the socialist protection of industrial property may accept the publication of the reviewed book with congratulations.

E. Lontai

BERNARD, F.–PAVLÁTOVA, J.: *Vznik změny a skončení pracovního poměru.* (Formation, modification and termination of labour law relations) Práce, Praha, 1979. 368 p.

The work consists of four parts. These are as follows: Work relations and their coming into being (Ist part), modification of work relations (IInd part), discontinuation of employment (IIIrd part), special regulation of certain work relations (IVth part). Within these parts the work consists of twenty-three chapters.

Chapter I.—under the title "Work relations and legal regulation"—deals with definition of work relations and characteristic features of that, separates work relations from other labour-law relations (especially from agreements made on works performed out of work relations (employment)), discusses legal facts as conditions of coming into being, modification and discontinuation of work relations (employment), analyzes furthermore the importance of terms and time reckoning for coming into being, modification and discontinuation of employment.

Chapter II. discusses the theme of the parties of work relations. First of all, this part gets us acquainted with the idea and type of the parties of work relations and then deals in detail with certain questions of subjects at labour law from the pont of view of the worker and the socialist organization. On the workers' side it does not escape the attention of the author to discuss even questions as e.g. the incapacitation or restricted disposing capacity of the workers, or the foreigners and displaced persons as subjects at labour law. The socialist organizations as employers, may be very different; the authors pay great attention to this diversity, as well.

Chapter III. is to introduce wide range of problems with the labour contracts. After analyzing the idea of a labour contract, the authors deal in detail with the contents and form of the labour contract, with the obligation of the organizations when employing the workers and when concluding the labour contract. This part discusses the general work contracts, too. This latter type of contract is concluded by socialist organizations among each other or with a social organization to provide the required manpower by the time of peak-works.

Chapter IV. discusses questions in connection with the date of coming into being the work relations (employment) and legal consequences of omitting to take on the work on the day stipulated for starting. The Vth Chapter is about rights and obligations originating from employment, with regard to workers and managers holding a leading post. The VIth Chapter deals with disputes related to coming into being of the work relations and treat furthermore of the real labour relations. Regarding this latter theme the question how far these labour relations are operative or inoperative is analyzed particularly.

Chapter VII. analyzes the modification of working conditions and within the frame of this the author deals with contractual modification of the working conditions, with modification to be made on the basis of unilateral arrangements of the organization, with modification made by the strength of legal rules as well as with modification related to reorganization when the

modification of rights and obligations of labour relations is made on the side of the employer only. Chapter VIII. treats of the complex question of transfer to another work (another line of activity) and then Chapter IX. deals with transfer to another working place. Connecting to this Chapter X. gets us acquainted with common rules of these two types of transfer. Chapter XI. is about conveyance of rights and obligations of labour relations to another organization while in Chapter XII. there is paid attention to disputes arisen because of unlawful transfer to another work or working place.

Chapters XIII–XX. take in spread nearly the half of the whole work (pp. 149–319.). Discontinuation of the employment in fact arouses wide range of questions from among of which introduction, by the authors, of general question related to discontinuation of employment may expect great interest. According to classification that can be read in the book, the employment may be discontinued by bilateral legal action (by agreement), by unilateral legal action of the worker or the organization (by notice, summarily dismiss, discontinuation of employment during the time of probationary appointment), by legal facts (death of the worker, withdrawal of residence permit in case of foreigners, etc.) as well as in case of expiration of the definite time of employment. Though, further classifications can also be considered in this connection, we think the position of the authors, in connection with the categorization, correct and logical. The supply of various certificates and the provision of free time to the workers for finding a new job are connected to discontinuation of employment. In case of unlawful discontinuation of employment, the enforcement of the claims of the worker means a very important question. The chapter dealing with discontinuation of employment is closed by analyzing the above question.

Chapter XXI. includes specific questions of secondary employment and the auxiliary job in reflect of the Czechoslovakian law. In Chapter XXII. the authors deal with labour relations established by election and appointment paying special attention to workers holding leading post. Chapter XXIII. pays attention to some kinds of employment falling under special rules.

Getting acquainted with the book affords much pleasure at least for the very reason that similar works have recently been published on this theme in some socialist countries. Comparison with them promotes, in presumably one of the most important fields of labour law, the comparative legal analyzing works and also facilitates to work up new conceptions in the socialist countries.

L. Trócsányi

NEWMAN, GRAEME: *Comparative Deviance*. Elsevier, New York–Oxford–Amsterdam, 1976. 332 p.

The work has been written in the middle of the last decade and deals primarily with the judgement of various deviances in six different cultural spheres. The following fundamental questions are posed for the definition of the direction of investigation:

1. Is there any difference between the law and the public opinion in the judgement of deviancy?
2. Is there a uniform or nearly uniform point of view as to what may be qualified as deviance?
3. Are there universal values or taboos?
4. In which structure the individual notions of deviancy are contained and how is their extent measured?
5. To what extent the classification shall be involved with respect to the judgement of these attitudes?
6. What is the relationship between the modernization, the notion of deviancy and the social changes? Is there any perceptible change in the judgement of deviancy? To what extent the developed countries diverge in the judgement of deviancy from the developing countries?

In the chapter dealing with the nature of deviancy the survey of tests is given which were made in the United States of America and in other Western countries concerning these forms of attitude "departing from the normal one", and their judgement, respectively, in different social strata. It is referred to that deviancy means a socially unrecognized status, i.e. such a form of attitude which runs across disapproval although its extent varies from country to country, according to different social strata.

The text-books of penal law mention two different categories of crime: the one is the *"mala in se"* (crime as such), the other is the *"mala prohibita"* (prohibited crime). The sociology denies the existence of the former one since *"mala in se"* assumes absolute values and attributes the concept of deviation to the natural law. The work expounds in details the categorization methods relating thereto, emphasizing the uncertainty and danger of *"mala ambigua"*. It is also mentioned that the judgement of the gravity of crimes against the property varies from one epoch to the other.

A separate chapter deals with the fundaments of the notion of deviancy as well as with the structural components of attitudes relating to deviances and with the social reaction developed in connection with various forms of deviancy. A survey of the countries, and of the culture of these countries, respectively, is given, the deviation problems of which the work intends to deal with, namely with the culture and ethnic characteristics of India, Indonesia, Italy, the United States of America and Yugoslavia.

The author points out the fact that in differently developed societies the family acts as an institution of social control and is the most powerful weapon in the struggle against the deviancy. The various aspects of the correlation between the preferred social sanctions and the influencing and direction role of the family are elucidated by means of statistical tables.

The work deals also with the different judgements of deviance in selected sub-cultures, such as in the country sub-cultures of India, Indonesia and Iran, the political and economical dimensions of which also the Marxist sociology has dealt with, as well as in the particular sub-culture of violence and crime on the Island Sardinia in Italy. The better developed countries decriminalize sooner a part of criminal conducts than the less developed countries being closer, more homogeneous and, at the same time, persisting more strongly to the traditional values—points out the work.

The volume is completed with an ample reference material.

M. Udvaros

The Future of the International Court of Justice (ed. by GROSS, L.) Oceana Publ., 1976. 862 p.

It seems to be almost a platitude in the special literature that the International Court of Justice (the Court) *has failed to meet the expectations*. The founders had intended to lend the highest judicial organ of the United Nations Organization (UN) an important role in international relations when they regarded it as one of the outstanding means of settling international disputes in a peaceful manner. Since the Second World War we have reached significant development in all fields of international law, *except* the judicial sector. Aware of this fact, the American Society of International Law established a *Panel* in 1971 with the aim to study the cause of *the Court's atrophy* by interdisciplinary means; to diagnose its ills and if possible to suggest remedies. In view of the limited space available I can review only the essence of those papers I considered as the most interesting.

R. P. Anand, Indian professor, introduces his study *"The Role of International Adjudication"* (pp. 1–21) by pointing out that the Court has been facing a *"crisis of confidence"* in the recent years, although its functioning is based on a universal need. The fact of the crisis can be proved not only by political and legal argumentations but also by the statistical data of the cases of the Court. The *"potential clientèle"* of the Court is much larger than that of its predecessor, the Permanent Court of International Justice. While the latter had 68 members out

of which 42 states were bound by the *"optional clause"* of the Statute of the Permanent Court, the same rate was 135:46 in 1972; and 155:45 in 1980, expressed in percentages it gives 61%, respectively 33% and 29%. But this rate is also misleading because most of the states made *widespread reservations to the compulsory jurisdiction* (Article 36(2) of the Statute). The practice shows *it depends on the states* whether they accept or not the jurisdiction of the Court in a concrete case.

Similar reserve can be observed on the part of the General Assembly (GA), the Security Council (SC) and other authorized organs and special agencies of the UN concerning the *advisory opinions* of the Court.

The question arises, what the cause of the distrust can be which is tried to answer by almost all papers revealing a rather wide range of the causes. We may agree with Anand's opinion that we must search the principal cause of the distrust in the political and ideological division of the world. The international community of today has only little connection with the so-called tradition of *the Hague-system*. The socialist states and the new states of the third world coming into being in great numbers have brought along quite different legal cultures and political attitudes.

One of the issues is the law applied by the Court, i.e. the *international law*. The developing countries—to a certain extent the socialist states, too—think that the present system of international law is unsuitable for making equitable decisions in the cases belonging to the Court. They refer to the fact that the traditional international law is a product of the western civilisation. *F. J. C. Northrop* in his book written about this problem (*Philosophical Anthropology and Practical Politics*, 1969) emphasizes that only that international law may be effective which is based upon ideological and cultural pluralism and offers an adequate synthesis way. Further he states that no nation will ever accept any decision made by third party on the base of the positive international law which violates its own effective law norms. In theory, this standpoint is assailable and refutable, nevertheless, the practical experiences of the international relations will rather bear him out. *Anand* holds the opinion, the developing countries have no common conception either in the question of the applicability of international law, but neither they give an alternative. In my view, the idea of the developing countries that the international law of today is the product of imperialism is not quite acceptable because the decisive part of its material emerged after the Second World War or has been filled with new content. To prove this idea let some data stand here: 16,000 international treaties were concluded in the past 35 years from which the agreements which came into being among states with different social systems are important sources of international law certainly represent a significant number.

Various charges were levelled at the Court by the "new" states that it is too conservative, too static, a defender of the status-quo, meanwhile the "old" states consider that stability is one of the essential elements of law. The states respect the achievement of *the Court in the development of international law* which activity, however, postulates its modern interpretation in certain questions. This leads the Court into a hardly resolvable dilemma—as *C. W. Jenks* points out (*Hersch Lauterpacht—The Scholar as Prophet*. 38 British Year Book of International Law, 1969. p. 31)—i.e. if the Court does not apply the international law in a flexible way then it has to work with such body of law which is no longer quite appropriate to contemporary needs. In the opposite case, on the other hand, the Court can be accused of a limited legal uncertainty ranging from inconvenience through confusion to chaos. The members of the Panel agree in the conclusion that a more intensive codification is needed in international law.

D. Ciobanu treats an interesting problem analyzing the *litispendence between the Court and the political organs of the UN*. It goes without saying that the SC and the GA are political organs where the states endeavour to assert their own politics through their representatives. But the Court is a body of independent judges. Under the international legal regulation it depends on the states' free discretion whether they turn over the given case to political or legal field. Practice

shows that the leaders of foreign policy prefer the former to the latter. Yet the question arises whether litispendence can be imagined in this relation. For the sake of preventing contentious procedure one can refer before the Court—on the one hand—to the fact that the given case is not a legal but a political one therefore it can be at the very most taken before one of the political organs of the UN, under Article 33(1) of the Charter, on the other hand, the interested parties will decide which of the peaceful means they opt for in settling their disputes. At the same time, the objections *lis pendens* and *res judicata* may never be concurrent, consequently, they exclude each other of estoppel. This legal problem was raised sharply in the Court's decision which was taken in the *Namibia case* and caused a lot of disputes. The question was whether the Court had to take into consideration the former resolution of the SC in the same case. *Judge Gross* expressed in his separate opinion that "from the viewpoint of law, the description 'situation' used by the Security Council has no effect so far as the Court is concerned."

Leo Gross wrote the final paper entitled "Conclusions" containing recommendations. Regarding the role of the Court Gross states that "in view of the terms and impact of Articles 2(3), 33, 36 and 92 of the Charter of the UN, recourse to the Court is an exercise and not surrender of sovereignty, is not an unfriendly act, ensures the equality of states before the law, is particularly desirable and suitable in disputes relating to the application or interpretation of bilateral and multilateral conventions, is valuable and integral part of the processes of diplomacy and peaceful settlement of disputes." The authors insist on the states' having recourse to the *Chambers of the Court* which would be competent in the cases having a special character. It is an interesting and thought-provoking proposal that the contributors of the Panel intend to authorize the Court to bear and decide appeals against decisions given by some other international tribunals. Article 72 of the 1972 Revised Rules of the Court makes this already possible to a limited extent.

Concerning the *jurisdiction of the Court* also considerable suggestions emerged. They propose that the International Law Commission of the UN should study the problems of the "optional clause" since just those states which accepted the compulsory jurisdiction of the Court under Article 36(2) of the Statute made many reservations to their declarations which practically nullified the very purpose of that Article. The Panel emphasizes further that the states should be reminded that the compulsory jurisdiction of the Court may be accepted by two states or groups of states with respect to their mutual disputes, particularly disputes relating to the interpretation or application of specified bilateral and/or multilateral conventions. The authors propose that Article 36(3) of the Charter of the UN should be used more frequently, suggesting that the interested states in a given conflict should accept by a previous commitment the recommendations made by the SC as binding which means under the Article in question the submission of the legal disputes to the Court.

Regarding the *enhancement of the advisory jurisdiction* of the Court the authors propose that a wider range of the international organizations should have access to the highest judicial organ of the UN but they would assure this right also to international commissions of conciliation as well as to tribunals established by multilateral conventions. Under Article 22 of the Charter of the UN they suggest the establishment of such a committee—as a subsidiary organ of the GA—which would request the advisory opinion of the Court on behalf of the organs entitled thereto mentioned before. At the same time, this committee would be authorized to forward the questions of the high courts of states in connection with international law to the Court in view of getting advisory opinion.

For the sake of *enforcing the decisions of the Court*, in accordance with Article 94 of the Charter of the UN, the authors propose that the states parties to the Statute should make provisions in their respective national laws to secure it. The Panel makes three proposals which would necessitate the *amendment* of Article 55(2) of the Statute since "the decisions reached by the *casting vote* of the President were unsatisfactory" (Report of the rapporteur of the Legal

Committee of the UNGA, Doc. A/8328, Dec. 11, 1970. p. 14., 32). The authors move that "if the Court is equally divided in contentious cases the Court would declare that the application has been rejected, in advisory proceedings the Court would declare itself unable to give the requested opinion." In my opinion, these proposals can be accepted, but the suggestion aiming at the amendment of Article 34(1) of the Statute ("Only states may be parties in cases before the Court") has much less chance. For the sake of enhancing the contentious jurisdiction of the Court the Panel proposes that the *international organizations*, as well as the *private individuals* have access to the Court. Both the Soviet Union and also France opposed heavily this suggestion in their responses to a circulated UN questionnaire. No doubt, such proposal could not lead to any reasonable result. The third proposal aims at the amendment of Article 38 of the Statute which lays down *the sources* which the Court can rely upon. The Panel expressed its view that Article 38 should be revised in order to find an appropriate place for declarations and resolutions of the GA in order to fortify their law-making character. To carry through such a proposal would come up doubtless against great difficulties as it is a generally recognized principle that the resolutions of the GA of the UN are not legally binding. (See Article 10 of the Charter.)

Leo Gross summarized the recommendations of the Panel in 26 points but many more proposals and ideas can be found in the collection of essays. The authors call upon the scholars of different nations *to dispute*, as well as *to study* various issues. Neither the Hungarian—and as far as I am informed—nor the socialist special literature on international law deals in due measure with the unsatisfactory role of the Court in international relations. Probably this conception of the theory comes from the practical fact that the socialist states do not resort to the Court. In my opinion,—for the sake of developing international law—we cannot renounce to studying this very complex theme and we must search the solutions which may lead us to the implementation of the aims of the United Nations, as envisaged in connection with international adjudication.

I. Szilágyi

Principii şi forme juridice ale cooperării economice internaţionale (Principles and legal forms of international economic co-operation), Ed. D. POPESCU, Bucureşti, 1979. Edit. Academ. 211 p.

Under the present-day conditions of technical and economic development international economic co-operation is of capital importance. The studies contained by the book discuss in general the problems of the principles and the legal means continuously developing in the relations mentioned above, according to the Rumanian political standpoints and views. Hereinafter we restrict ourselves to mention only the names of the authors and the subjects of their studies.

The article of *V. Duculescu* is entitled "The new universal economic order as a suitable frame for the promotion of reasonable co-operation of every state in the world".

In his article *R. Munteanu* writes about the international co-operation in the field of the industrial development. The author analyzes its place and role in our age, its legal frames and the concerning practice in Rumania.

A. Nastase's article is entitled "General Agreement on Tariffs and Trade (GATT)". It is about the legal nature and the structure of GATT, the principle of disregarding discrimination and other principles.

O. Capaţina and *V. Tănăşescu* have written about mixed companies with Rumanian participation.

The article of *Br. Ştefănescu* and *I. Rucăreanu* is entitled "Non-governmental international economic organs of the member-states of the CMEA".

O. A. G. Crauciuc discusses the topic of the transfer of technology dealing with the concerning activity of the UNCTAD and other UNO organizations and that of other organizations respectively.

D. Popescu's study is entitled "Protection of the environment and the reasonable exploitation of natural resources". The author has chosen a problem, which is perhaps the most timely and of great importance in the present epoch of the scientific and technical revolution. Political and legal aspects concerning the problem of environment are elucidated. The author emphasizes the global character and significance of this question and connects it with the foundations of a new universal economic order. On the one hand, special attention is devoted to the sovereignty concerning natural resources. On the other hand, the importance of co-operation among the states in connection with the protection of environment and the exploitation of natural resources is also emphasized.

M. Lázár

TSIEN, TCHE-HAO: *La Chine* «Comment ils sont gouvernés», Tome XXVIII. Paris, 1977. Librairie Générale de Droit et de Jurisprudence, 742 p.

For all that China's ancient development and present stand in the forefront of international interest, both subjects seem to be unexplored enigmas. Researchers feeding on the cultural traditions of the western hemisphere often seek for their own values in the Chinese development. Therefore also the approach of problems can easily be distorted as they can be set in the connections of a different system. On the other hand, researchers with Chinese traditions perhaps take into respect exclusively their own traditions, mediating only these and so risking that no real communication comes into being as a result of their work.

Under such circumstances the issue of Dr Tsien's work was expected by scholars as a great sensation. The author is an expert of comparative law, politology as well as administrative sciences, who lived in China until 1949. He renewed his acquaintance in the course of his study tours in 1972 and 1975. For three decades now he has been one of the most famous specialists in France on China as senior staff member of the National Centre of Scientific Research. He has published his knowledges based upon wide documentation in dozens of books about the political, administrative and legal development of present-day China.

The writer of the present note is neither an amateur nor a dilettante relating China-research. He is simply a student of theory of law endeavouring to analyze jurisprudential problems of law, in conformity with the basic methodological requirements of a social science theory and on the basis of comparative analyses extended in space and time. He has got acquainted with the problems of China's legal development only among others and with the mediation of secondary sources. Therefore his position is hardly excusable as he is striving to express his doubts, which were increasing all the time during reading.

The book embraces a wide subject matter indeed. In Part One the geographic and historical frames of China's development are outlined. Part Two summarizes the thoughts influencing the present-day Chinese development. In Part Three the institutions are expounded. The book is closed with a number of valuable appendices. Among the documents one can find three articles of Mao Tse-tung, such as the party decision about the cultural revolution dating from 1966, the Statutes of the Communist Party of China from 1973, the Constitution of 1975 as well as Tshou En-lay's government account from 1975. China's development since the middle of the last century is recapitulated by chronology. The basic Chinese and non-Chinese literature dealing with the subject is reviewed by bibliography. Finally, the book is closed with useful registers besides the index, such as a chronological index of sources having the force of the law, an index of Chinese proper names and that of Chinese slogans and ideological key-notions.

After all the reader gets an enormous quantity of information but not a coherent, scientifically utilizable view. The author seems to have performed the simplest work: having elaborated a systematics logically, he systematized and made known the disposable documents in a positivistic way, according to the previously separated subject matters.

The work is by itself a whole but it is not utilizable as a handbook or reference source either. The elaboration is devoid of the demand of historical approach. Numerous Chinese party documents deal with the considerable effect of the quondam struggle between the set and unset variants of social norms (*viz.* between the *li* and the *fa*) on the development of the socialist China. This struggle appeared once when China introduced a number of European institutions after 1949 with Soviet mediations and showed another side when, having started the cultural revolution, all of them were rejected. These questions are even not formulated by the author, perhaps as they would not be suitable for his system inspirated by the present. At the same time everything is natural and given for the author in the way it appears. He is devoid of both critical distance-keeping and the demand to contemplate from out. This manifests itself not only in his theoretically unfruitful, positivistic approach but it influences his frequent emotional valuations as well. The author is a champion rather than an analyst of the subject of his investigations, as already ascertained by another reviewer (M. J. MEIJER, in Review of Socialist Law, IV [1978] No. 3, pp. 299–300) as well.

In my opinion, the fundamental problem is that within the framework of a series of books destined for introducing the governing of various states of the world the author deemed it sufficient to describe the formal institutional frames in a positivistic way and to introduce the ideological manifestations systematically instead of analyzing the actual reality. The conception of the series was defined as one of comparative character but the present elaboration is not suitable for any comparison as the analyzed phenomenon, respectively its formal and verbal manifestations, are seen as sufficient in themselves. In this way, however, the present work cannot be regarded as a politological one either because even the readiness for reflecting with the facts of practice does not appear in it. Neither can it be taken for a juridical work for the law as such—apart from occasional mentions—does not appear in it. Provided that the two basic and universally known means for the state direction of society are the administration and the law, this book discloses only a little about direction of society as the chapter devoted to administration is one of the shortest and meagrest ones and law is one of the least significant and specified categories in it.

As far as the problem of law is concerned, the following view can be composed from the various sparse references: the distinction between the *li* and the *fa* was simply a hypocritical means of the imperial reigning (p. 42). It can be discovered by the organigrams constructed by the author on the basis of the Constitutions from 1954 and 1975 that formerly the supreme power was lodged in the national assembly, at present, however, it is in the hands of the president of the party. According to the new Constitution, the party is the supreme organ of state power and this is also expressed in respect of commanding the armed forces, as announced already at the 10th Party Congress in August 1973 in Tshou En-lay's account (§§ 2, 16 and 15, especially pp. 212–213). The national assembly is the exclusive organ of legislation but no law has been enacted by it since the new Constitution was passed. "In the first years of the People's Republic of China a number of laws were voted for by the legislative organs, so much the more as the Communist Party had repealed all codes originating from the former regime. A lot of lengthy bodies of the law published in that era testify the comprehensive legislative activity. But having filled the demands relating law texts the legislative activity was diminished to such a degree that it became unsignificant. Since the regime rests upon the fact that all Chinese people know and attain the legislation perfectly, there is no need for modifying the texts incessantly and for establishing a complex legislative system requiring the collaboration of specialists. On the other hand, the fundamental laws have been passed from the outset with regard to the future development and

relatively in the recent past and that is why the necessity of modifying has not come up yet" (p. 463). This impression is confirmed by the indices in the end of the book, too. Namely no proper legal rules have been enacted since 1966 but the new constitution (p. 664). Still the author treats the functioning of political forces, administration and jurisdiction separately and without any correlation, as if they had no common linkage points. Finally, as far as the role of law (discerned from that of politics) is concerned, only some uncertain references may be found. They inform that "Legality is respected in China as far as there are laws (and connected texts) and legal rules which are observed and brought into operation." At the same time, the principle *"nullum crimen sine lege"* or that of the prohibition of analogy in criminal law are not even raised in the Chinese legal conception. "Judgement rests upon the Constitution, the rights and obligations of citizens laid down in the Constitution, the sum of legislative texts and special laws... and in the same way upon the policy of the party, the principles of marxism–leninism and Mao Tse-tung's thoughts, further upon 'experiences which can be drawn from previous decisions'" (p. 498).

The lesson, what the Chinese way of the building up of society could give for western theory and practice, continues essentially to be an unexplored enigma.

Cs. Varga

GUARINO, A.: *La rivoluzione della plebe*. Società e diritto di Roma 1. (The revolution of the plebs. Society and law of Rome 1.) Liguori Editore, Napoli, 1975. 336 p.

The book of this internationally renowned Neapolitan legal romanist scrutinizes one of the most significant periods of Roman history. As to the title of the book analyzing the questions of the "revolution" of the plebs, it refers in itself to a certain problem of terminology. With respect to the fact that, on the one hand, the technical term of revolution is generally sharply separated in the literature of ancient history and, on the other hand, that the book embraces approximately one and a half centuries, *viz.* the period from 510 (509) till 367 B. C., it would have been perhaps more correct to write about evolution. Such a period extending almost one and a half centuries precludes namely the possibility of the justified using of the expression *"rivoluzione"*. It is a debatable point further, to what extent it is reasonable to apply the categories of class struggle and classes in an undifferentiated way. In our opinion, it is an over-simplification to use these notions without a prudent historical analysis.

The author analyzes in details the period of transition from the epoch of kingdom to that of republic. In his opinion, the expulsion of the last Etruscan king, Tarquinius Superbus did in itself not create the republican constitution. The institution of kingdom remained also after ceasing the Etruscan rule and certain reforms meant the only change. On the basis of the sources being at disposal it is unfortunately not possible to retrace this transition period respectively—to be more precise—its characteristics. Guarino takes the view that the basic cause of the contrast between patricians and plebeians has to be found in the particular closed clan system of patricians. The organization relying upon the scheme of *familia–gens–curia–tribus* remained dominant also after the expulsion of the last Etruscan sovereign and it constituted the basis of monarchy resting upon a certain kind of election. This hypothesis is in our view verified by the fact that the importance of the senators, *viz. patres-auctores* grew considerably in this transition-period and its contents already known in the time of Latino-Sabine kings was recovered. Having disappeared after Tarquinius Priscus' reign for some decades, the *auctoritas patrum* came in sight again in a form documented by Livius and this points to the institution of an elected king. Sticking yet to the subject of the institution of *auctoritas patrum*, the enrichment and expansion of the contents of this institution was already broken off at the turn of the 5th and 4th centuries B. C. and also this fact confirms Guarino's thesis. Consequently, the course of the widening of the contents broke off just in the time of the plebeians' obtaining equal rights with the patricians.

Making the two strata also legally equal, the lex Publilia Philonis originating from 339 B. C. and the lex Maenia passed in the 3rd century B. C. transformed the *auctoritas patrum*, which became a notion referring to the rights of both patrician and plebeian senators equally from this period (according to De Martino's very plausible view).

Guarino thinks that plebeians were originally a group having a politically independent settlement (in the mons Aventinus) and later falling victim to the conquering Romans or more precisely *Quirites*. So the stratum of plebeians can be sharply separated from that of *clientes* being already previously subjects of the *Quirites*. Servius Tullius' reform, which according to the predominant view in literature the system of *comitia curiata* established, concerned exclusively the army—supposes the author. Therefore the reform did not mean any significant change as far as the separation of the two strata is concerned. Plebeians had no political rights further on either. Later this circumstance conduces fundamentally to the revolution of the *plębs*, which, however, could not achieve any decisive effect even after Tarquinius Superbus' expulsion. As to the private law, the *"ius Quiritium"* concerns henceforward definitely the norms regulating the legal position of *"cives"*. Establishing the system of an army divided into *curiae* demanded, in our opinion, also the reform of the *comitia*. It seems to be very hypothetic to separate the *exercitus centuriatus* from the system of *comitia curiata*. It must not be forgotten namely that also the *exercitus centuriatus* itself had authority concerning private and public law. On this basis it is hardly feasible that soldiers of plebeian origin would not have *suffragium* in the domain of the *ius publicum*.

According to Guarino the *comitia centuriata* appeared in the time of passing the *leges Liciniae Sextiae* (367 B. C.) on the model of the *exercitus centuriatus*. In conformity with this supposition the centuries old contrast between patricians and plebeians could come to an end only after passing these laws. This thesis of Guarino, *viz.* connecting the ceasing of the antagonistic form of the class struggle with the *leges Liciniae Sextiae* leaves the significant reforms appearing even in the analyzed period out of consideration. On the basis of this view, the significance of several provisions concerning the plebeians definitely favourably—among others some of the Twelve Tables—fell into the background. Also the *lex Canuleia de connubio patrum et plebis* (from 445 B. C.) and besides that a number of reforms taking into consideration the interests of plebeians were disregarded. It has to be remarked that there is no question that the author deals with these reforms. E. g. the above-mentioned *plebiscitum* suggested by the people's tribune Canuleius is analyzed on several pages. Guarino attaches almost exclusive importance to the *leges Liciniae Sextiae* regarded by him as the most significant compromise eliminating the contrast between patricians and plebeians. The author does not take in respect the documentable fact that organizing an army on financial grounds inevitably involves also the reform of *comitia* organized on the same grounds as separating rigorously the two reforms from each other would be unhistorical. It cannot be led back exclusively to the compromise mentioned above that—as clearly described by Guarino in the last chapter of his book—in the time of Pyrrhic wars Rome was a state having approximately one million inhabitants and about twenty hundred square kilometres. The *leges Liciniae Sextiae* regarded as the *"punto di rottura"* of the constitution of the patrician state is undoubtedly of great importance but its role related to creating the "peace between the classes" is by no means exclusive.

In spite of the critical observations above we can ascertain that Guarino's book—which is the first volume of a series analyzing the connection of society and law under the conditions of ancient Rome—describes very clearly and also in details the course, main features and results of the political struggle between the both strata enduring indeed for centuries. Relying upon results of the latest historical researches, the book is a reinterpretation rich in ideas of the achievements of previous investigations. The original elaboration of a subject concerning equally the domain of *ius publicum* and *ius privatum* can rightly command the interest of the historians as well as of the representatives of the jurisprudence.

G. Hamza

BISCARDI, A.: *Ordinamento, prassi e giurisprudenza alla luce del diritto romano.* Sommario didattico e antologia di testi a cura di Franco Gnoli (Order, practice and jurisprudence in the light of Roman law), Cisalpino-Goliardica, Milano, 1975, I + 70 p.

The book of the excellent representative of the science of Roman law analyzes the questions of legal system, legal practice and jurisprudence in the field of the Roman law. The legal system—as pointed out in the foreword of professor Biscardi's work—means the legal norm structure. The legal practice refers to reality, to the field of the application of legal norm which—especially in the sphere of vulgar law—may withdraw from the statutory legal regulation. Finally, the jurisprudence is the concept signifying the "science" of law, its theory, the sum of knowledges relating to the law which refers to the so-called *interpretatio iuris*. The characteristic of this jurisprudence interpreted as *"interpretatio iuris"* consists in that it may play essentially the part of the link between the legal practice and legal system.

The first part of the work falling into two main parts deals with the particularities and characteristics of the legal system. The second part, however, analyzes in details the relationship between the legal system, legal practice and jurisprudence by way of a concrete example, namely of the introduction of the principle of *"emptione dominium transfertur"* as historical paradigm.

In the part investigating the characteristics of Roman legal system the author states that the Roman law is characterized by a kind of pluralism, expressed partly in the differentiation of social groups *(gentes, familiae, civitas)*, and partly in the numerous groups of legal norms *(ius civile, ius sacrum, ius honorarium, ius gentium)*. The first-mentioned form of pluralism is the so-called institutional pluralism *("pluralismo istituzionale")*, whereas the second form means the normative pluralism. On the strength of the analysis of D. 50.16.195.2. (Ulpianus), Biscardi arrives to the conclusion that, as a matter of fact, a distinction should be made between the so-called *familia proprio iure* and the so-called *familia communi iure*. The basis of distinction is given by the dissimilarity of bonds keeping together the members of family (namely the power *[mancipium]* of *pater familias*, and the *agnatio*, respectively). Examining the legal significance of *gens* the author refers to the part played by this category in the order of succession of *tutela legitima* as well as of the Twelve Tables' Law. He poses, in addition, the question much discussed in the literature that the significance of *gens* might be probably in the delimitation of patricians and plebeians *("plebei gentes non habent")*. It should be noted that Biscardi takes no unambiguous position in this question. Analyzing the information contained in Gaius' Institutiones (Gai. Inst. 1.3.) the author emphasized the legal independence of *plebs*, being manifested partly in *leges sacratae* founded on ritual traditions, and partly in *plebiscita* accepted on *concilia plebis*. The author refers besides to the fact that the *Nomen Latinum* refers actually to a certain kind of independence—namely during several centuries. In the field of the so-called *"aliae civitates"*, Biscardi calls the attention to the differentiation between *peregrini alicuius civitatis* and *peregrini dediticii*. Summing up, he notes that the so-called institutional pluralism manifests itself on the level of *civitas*, on the one hand, and within the *civitas*, on the other hand. The institutional pluralism comes to a role, in addition to the above-mentioned relations, e.g. in the relation of Church and state, too.

Analyzing the normative pluralism the author investigates first the relationship between *ius* and *lex*, as well as *ius civile* and *ius legitimum*. He refers to the fact that the *ius* means originally the *mores* integrated by *pontificium interpretatio*. At the same time, *lex* appears in the archaic age as "impediment" of *ius ("si presenta come un argine")*. With respect to the close connection between *ius civile* and *pontificium interpretatio*, the known fragment of Pomponius (D. 1.2.2.12.) is cited ("... est proprium ius civile, quod sine scripto in sola prudentium interpretatione consistit"). In the opinion of the author, the distinction between *ius civile* and *ius sacrum* acquires a greater importance in the period of the republic. The distinction between *ius sacrum* and *fas* is also of great significance. As positive examples of *ius sacrum*, Biscardi mentions the so-called

leges lucorum (*lex luci Lucerina* and *lex luci Spoletina* in the 3rd century B.C.). *Ius divinum* and *ius pontificium* may be considered the synonyms of *ius sacrum* (Cic. Brutus 42.156.). The author points out that *ius sacrum* is occasionally—especially in the last century of the republic and during the imperial period—treated so to say "monographically". As examples the work of Servius *"De sacris detestandis"* and that of Trebatium *"De religione"* are mentioned. On the strength of the non-legal sources (Quintilianus, Inst. orat. 2.4.33–34.) *ius sacrum* means some kind of independent concept to be compared with *ius privatum* and *ius publicum*. Biscardi while investigating *ius civile* and *ius honorarium* mentions as example the *actio Publiciana* which is unambiguously the result of the legislative activity of *praetor*.

When comparing *ius civile* and *ius gentium* the author comes to the conclusion on the basis of the analysis of legal and non-legal sources that *ius gentium* having several senses is united to one single concept basically by the reference to *naturalis ratio*. The delimitation of *ius publicum* and *ius privatum* does not cause any problem. The author refers to the fact that the terminus technical *"publicus"* stands near implicitly, as for its meaning to *"populus"*. The distinction between *ius ordinarium* and *ius extraordinarium* is based essentially on the difference between the formular proceeding and *extraordinaria cognitio*. At the delimitation of *iura* and *leges* Biscardi refers to the antitheses pair of the Greek legal *koiné nomos* and *diataxis*.

Dealing with the ample meaning of the word *lex* the author points out that it may basically refer to *lex publica*, to the agreement between the parties (as e.g. *lex commissoria* or *lex locationis*), to *legis actio* and, finally, to the so-called *lex dedicationis*. The author deals especially minutely with the sources of Roman law. He adverts to the fact that in the classical age the *senatus consulta* and the imperial *constitutiones* range with *lex*. He emphasizes that the jurist's responses become obligatory on the basis of *auctoritas principis* which binding force has lastly as basis *ius respondendi* issued by Augustus. The great significance of praetorian *edictum* is referred to by the fact that it is occasionally called *"lex annua"* by the sources (Cicero, in Verrem 11.1.42.109.). Further on, the author analyzes the relationship between *lex* and *consuetudo*. Finally, it deals with the question that with Justinian those of laws may be considered practically "eternal" which are based on *"naturalia iura"* (Iust. Inst. 1.2.11.).

In the next part of the book Biscardi analyzes briefly the relationship between the Roman law and the local popular laws. Within the range of this theme he refers to the great significance of *Constitutio Antoniniana*.

In the part investigating the relationship between legal system, legal practice and jurisprudence the author analyzes in details the principle of *"emptione dominium transfertur"* as a paradigm which correctly represents the connection with each other of these three concepts. When analyzing the effectiveness of the above-mentioned principle, the author refers to the fact that in the archaic Roman law—this is the case with the *mancipatio* meaning the cash settlement—the purchase contains *in se* the conveyance of title to the buyer. In the next phase of the development of law—as it may be concluded primarily on the strength of sources issuing from Gaius—the purchase as transaction is markedly separated from the conveyance of title. In the third phase—in the post-classical age—the purchase contract runs already close the act of purchase. As a result thereof the purchase which became *contractus alienationis*, leads automatically to the conveyance of title. Finally, it is Justinian—this is the last, fourth phase of development—who returns to the classical standpoint and insists—in addition to *contractus (pactum)*—on the independent act of conveyance of title. This concept is expressed especially clearly in Codex Iustinianus (2.3.20. Impp. Diocl. et Max. a. 293.).

The book of Biscardi, founded on the substantial analysis of the sources and literature, elaborates in an original manner the complex problem of the relationship between legal system, legal practice and jurisprudence in Roman law. This work may be usefully read by research workers of law and those interested therein.

G. Hamza

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среды.] = Környezetvédelem és jog: 148—179.

Sólyom László: Az injuria és a személyiségi jogok. „Semlegesség" és technika. [Injury and personal rights. "Neutrality" and technics. Injuria и личные права. «Нейтралитет» и правовая техника.] ÁJ. 2/81: 219—262. — Rés. franç.; Русск. содерж.

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VI. Labour Law
VI. Трудовое право

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Hágelmayer Ida: Labour law protection of working women. Защита трудящихся женщин по трудовому праву.] = Annales Bp. Tomus 22: 37—60. Русск. содерж.; Dt. Zusammenfassung.

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Trócsányi László: Környezetvédelem — munkavédelem. [Protection of environment — labour safety regulations. Охрана окружающей среды — охрана труда.] = Környezetvédelem és jog: 219—238.

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in the protection of the environment in the working places. Система норм охраны окружающей среды места работы.] ÁJ. 3/81: 327—343. — Rés. franç.; Русск. содерж.

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VII. Family Law
VII. Семейное право

Articles — Статьи

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Cseh-Szombathy László: A mai magyar család típusai és ezek működése. [Types and function of the Hungarian families today. Типы современной венгерской семьи и их функционирование.] JK. 7/81: 561—567.

Csiky Ottó: Családjogunk fejlődésének újabb tendenciái. [Recent tendencies in the Hungarian family law. Новые тенденции в развитии венгерского семейного права.] JK. 7/81: 553—561.

Ficzeréné Sirko Alexandra: A család stabilitása és a jog. [Stability of the family and the law. Стабильность семьи и право.] JK. 7/81: 567—571.

Hartai László: Szerződés a házassági vagyonjogban. [Contracts in the matrimonial property law. Договоров в брачном имущественном праве.] JK. 7/81: 584—590.

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Weiss Emilia: Vétkesség, feldúltság és a házasfelek közös megegyezése a múlt és a ma magyar házassági bontójogában. 1—2. r. [Fault, breakdown and mutual consent of the spouses in the past and present law of divorce in Hungary. Part 1—2. Вина, расстройство, общее согласие супругов в прошлом и сегодняшнем венгерском законодательстве о расторжение брака. Часть 1—2.] JK. 7/81: 571—583.; JK. 11/81: 901—919.

VIII. Land Law
VIII. Земельное право

Articles — Статьи

Domé Györgyné: A környezetvédelem földjogi vonatkozásai. [Land law aspects of the protection of environment. Земельно-правовые аспекты охраны окружающей среды.] = Környezetvédelem és jog: 202—218.

Jójárt László: Az idegen területre történő építkezés ingatlannyilvántartási vonatkozásai. [Real estate registration aspects of building on alien soil. Аспекты земельной регистрации случаев строительства на чужой территории.] ÁI. 7/81: 654—663.

Kiss István: Földtulajdon vagy földtulajdonjog? [Land property or land property rights? Собственность на землю или право собственности на землю?] JK. 6/81: 533—536.

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as goods and its goods character as reflected by the legal sciences. Земля как товарь, её товарный характер в правовой науке.] GazdJogtud. 1—2/81: 257—285.

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IX. Law of Co-operatives
IX. Кооперативное право

Articles — Статьи

Bak József: Néhány gondolat a szövetkezetek jogi szabályozásának felülvizsgálatához. [Some remarks concerning the revision of the legal regulation of the cooperatives. Некоторые мысли о пересмотре правового регулирования кооперативных организаций.] JK. 8/81: 668—675.

Prugberger Tamás: A szövetkezeti önigazgatás demokratizmusának néhány problémája. [Some problems of the democratism of self-management in the co-operatives. Некоторые проблемы демократизации кооперативного самоуправления. ÁI. 9/81: 812—820.

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X. Criminal Law. Criminal Sciences
X. Уголовное право. Вспомогательные науки уголовного права

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Király Tibor: A büntetőjog és a garanciák. [Criminal law and the guarantees. Уголовное право и гарантии.] GazdJogtud. 1—2/81: 1—12.

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Molnár József: Az ifjúkori bűnözés helyzete, a megelőzés társadalmasításának formái és lehetőségei. [The present state of juvenile delinquency and the forms and possibilities of prevention. Состояние преступности несовершеннолетних, общественные формы и возможности предупреждения.] = Krim. tanulm. 18: 228—254. — Русск. содерж.; Eng. summary; Dt. Zusammenfassung; Rés. franç.

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XI. Juridical Organization
XI. Судоустройство

Books — Книги

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XII. Civil Procedure
XII. Гражданский процесс

Books — Книги

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[NÉMETH János] НЕМЕТ Янош: Особенности судебного разбирательства в производстве по вновь открывшимся обстоятельствам. [Characteristics of the retrial.] = Annales Bp. Tomus 22: 123—134. — Eng. summary; Dt. Zusammenfassung.

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XIII. Criminal Procedure
XIII. Уголовный процесс

Articles — Статьи

TREMMEL Flórián: A magánvád létjogosultságáról és jelentőségéről. [On the importance and justification of the private prosecution. О праве на существование и о значении частного обвинения.] JK. 11/81: 936—941.

KIRÁLY Tibor: Die Möglichkeit der gerechten richterlichen Entscheidung. [Possibilities of just judicial decisions. Возможности справедливого судебного решения.] = Annales Bp. Tomus 22: 77—98. — Русск. содерж.; Eng. summary.

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XIV. International Law
XIV. Международное право

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XV. Private International Law
XV. Международное частное право

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XVII. Miscellaneous
XVII. Смешанное

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XVIII. Documentation
XVIII. Документация

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INDEX

Informationes

Recensiones

Varia

Internationalia

Bibliographia

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ACTA JURIDICA, TOMUS XXIV.

INDEX

Informationes

Recensiones

Varia

Internationala

Bibliographia

Acta Juridica Academiae Scientiarum Hungaricae, Tomus 24 (3—4), pp. 287—296 (1982)

Some aspects of the relation between law and state

Prof. V. PESCHKA

Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences

The paper starts from the approach of the special substance and general relevance of law and surveys the difficult social and legal process, in which the law itself appears and becomes reality. It surveys the law from the aspect of the role played by the state in this process—this role is special and important indeed. Followingly it actually analyses the legislative activity of the state, the social and state framework of this activity, furthermore the realization process of law and the significant influence of the coercive power of the state in this process.

In order to clarify and understand some aspects of the relation between state and law, with other words their interdependence one have to set out from the basic inner controversy of the law itself, which has a social nature. To put it philosophically that means: the *substantial specialty* of law permanently contradicts the *general nature of its validity*. It means that one given law system in a certain social order is valid, i.e. the legal norms are valid for the society as a whole generally; the legal regulations are to be kept by every member of the society: regarding the totality of the given society the law is generally valid. Above all this generality of the validity of the law substantiate the ontological statement that the law as social objectivation has an overwhelming very significant category: its *generality*. This categorial predominance of the generality in the law means the following: in the law as a special social objectivation, both in its origin and in the processes of its realization everything is under the generality, partly as its object, partly as an instrument, which promotes the realization of the law. The actual legal sociological surveys prove in spite that in the general validity of the law does not come out the substantial generality of the society as a whole, but as a consequence of the sociological stratification of the society only the *specialty* of certain social class, strata and groups is expressed. Quite simply we experience that the generality of that one law, which solely valid in the society does not express directly the general interest and intention of the society, but it expresses the needs, interests and intentions of that special social class, stratum or group, which possesses such political prevalence in the society, which enables it to create and realize of a monist law and legal system, which is generally valid for the society. All of this means that in the law a special social substance expresses itself, which represents special social interests and intentions with general validity for the whole society.

As Rudolf Jhering aptly put it[1] "The function of the law is generally expressed in its realization". That basic inner controversy of the law that it expresses a special social substance, i.e. value judgement with general validity and this way it touches just exactly the function, realization of law as it was emphasized by Jhering. Namely when the special social interests and values—as they are formulated in the law regulations—are valid and binding for the whole society, for each member of the society, a whole set of controversies emerge between the speciality of the social substance expressed by the law on one hand and the special interests, intentions and values of the individual social classes, strata and groups on the other. Among others the purpose of the law is to find a kind of compromise among the different or even controversial special social interests and values in order to make it possible for the society to live without troubles and friction. Naturally this requires first of all that the special substance expressed by the law should not be merely valid as a law, but it should generally prevail in the actual practice of the everyday life of the society as well. That inner structural characteristics, that in the law as social objectivation the general has categorial predominance, that in the law everything is subjected to the generality, partly as its object, partly as an instrument of its realization, finally emerges for the very reason that the validity of law ought to prevail above everything and the law generally must prevail. Just how true is that very well illustrated by the process of creation of law, the legislation, in which the legal contents and forms always shaped accordingly to the aim and destination that the realization of law in the life of the society should be as easy and undisturbed as possible.

Both the expression of the special social substance in the law with general validity, and the general realization of the special social substance in the social life—needless to say—involves an extraordinarily difficult and complex set of sociological and legal processes, in which the state as a very special social organ has an important role and significance. It is sufficient to take a look at the *legislative activity of the state* and instantly we see the whole complexity of the legal-sociological process. I had already referred to the fact that the realization and prevalence of the law permanently influences or even determines the legislative activity. First of all we mean that in shaping the special social content expressed by the law ought to be done very prudentially and carefully by the state authorities as far as sociological arguments are concerned. It would be a mistake of vulgarization to think that the political ruling classes, strata and groups can directly reveal their interests, values and intentions with general validity if they expect the steady and undisturbed prevalence of law. The great role of the state in shaping the social substance of law appears—among others—exactly in that special, objectivated characteristics that with its apparatus, which alienated from the society, can present itself as it would stand above the special social interests and values, therefore it would be suitable to reconcile the prevailing political special interests and values with other interests of the various classes, strata and groups

[1] JHERING, R.: *Geist des römischen Rechts*, Leipzig, 1873. Erster Teil 49. p.

of the society. Moreover the task of the state legislative organs and activity to blunt the controversies in the classes, strata and groups themselves, which possesses the political power and this consensus ought to be expressed in the law with such quality and form, which assures its undisturbed prevalence generally in the society.

It is worth to stay awhile at this problem and without striving to be complete at least refer to the important moments which appear in the complex state, legal and sociological processes of the social substance of the law. First of all we ought to raise the attention to the fact that the united interest of a class—even the politically ruling class—is not equal to the cumulative individual interests of those persons, strata and groups. Here it is a dialectical controversy between the interests of the individuals (class members) and the special interests of class. Already Hegel had pointed out that the general is not equal with the sum of the individuals, it is not equal with the merely common, but it means common substance.[2] Therefore when the legislative organs of the state formulate the interests of the special ruling class as law regulations, they strive for such generality, which expresses the substantial common in the individual interests. Meanwhile it hides in itself the possibility of contradictions among the class individuals, the strata and groups, which belong to the class and among the class and group interests as they are expressed in the law, as special social content. Its importance shows itself in the realization processes of the law. The situation is getting even more difficult if we survey the daily, direct interests of the political ruling class considering the special social content of law, and furthermore we survey the differences due to those long-range interests, which are originated from the social-historical destination of this class. In such case the danger of departure from the direct, concrete and individual interests of the persons, strata and groups, who belong to a certain class, clearly emerges and that measure is always problematic, which is used by the legislator—considering the realization process of the law—in the course of preferring the long-range interests of the class against the direct daily class interests, or even more the individual interests of those persons, who belong to that class.

If it is possible at all, the situation is even more difficult regarding it sociologically and the legislative system of the state faces even more delicate task considering the fact, that—as I mentioned—during the legislative activity, shaping the social value content of the law they have to consider not only the interests and values of the political ruling classes and groups, but they have to think about the fact that the diverging classes and groups of the society have their own interests, intentions and values too. Therefore in the state-controlled legislative activity the political ruling class or group always ought to create compromises among the different class and group interests in order to shape out such a particular social content of law, which expresses mainly the interests of the ruling class in such way that the realization process of law is

[2] HEGEL, G. F.: *A filozófiai tudományok enciklopédiájának alapvonalai.* I. rész. A logika. (The Outlines of the Encyclopaedia of the Philosophical Sciences. The Logics.) Budapest, 1950. Appendix, pp. 153–154.

sociologically more-less assured in the given state of the classes and groups, with other words, the state of the social totality. Thus it would be a big mistake to think that the particular social content of the law is directly and clearly express the interests and values of the ruling class, which has the political power. In the sociological level of the interests a lot of bargaining and compromises are necessary. Their sociological significance is expressed ultimately by the existence of law and this is extraordinarily important for building and developing the political rule at all.

In this connection I would like to mention only that finding the channel for the law while practicing the guidance of the society and political rule itself means *limitation,* particularly as far as its sociological content is concerned. What we should think about this limitation? First of all it means that the legal form, the codification of legal norms, i.e. the legal expression of the interests of the political ruling class or group by itself gives certain framework, limits for the political activity of the ruling class. If we merely think about that certain political ideas, concepts, programmes and promises are expressed in legal form—even if they are not directly expressed—then we understand at once that this legal formation means limitation in the course of practicing the political rule for the politically ruling classes and groups, because they always have to find the harmony between their political activity and their earlier politics, which is already expressed in legal form. This *limitation* is even more obvious in its sociological aspects, because—as I mentioned—in the legislative activity of the state it must be always attention paid to the diverging interests of the classes and groups and it fixes compromises while making legislation regarding these interests. The fact that the politically ruling class or group cannot give limitless prevalence to its particular interests in legal form, but it has to consider the given outer and inner circumstances for the sake of ruling optimal rule, obviously means the legal and sociological limitation of the political rule. Naturally this inner sociological limitation of the political power is not only necessity for the political rule, but in the same time it is an essential condition of the realization and prevalence of the legal regulation as well.

The competent organs of the state in the course of legislation no matter how much they consider the diverging class and group interests, no matter how much they yield and accept compromise solutions, all of this does not eliminate the basic inner controversy of the law, which exists between the particularity of the social content of law and the generality of its validity. This inner ontological controversy of the law—as maybe already appears—is based on sociological foundations, namely on that simple social fact that both the individual interests of those persons, who belong to the ruling class and the particular interests of the diverging classes and the particular interests of the ruling class or group, which is expressed in the law with general validity, are still different to each other. Expressing it philosophically: the particularity of the social content of law is dialectically opposing both with the individual interests of the persons living in the society and the particular interests of the diverging classes and groups. This contradiction is expressed by the law such way that the law—the particular social content of it—is possessing general validity for the total of the society and its each unit

as well. No matter how carefully and sophisticated way the competent state organs are doing their job during the legislature, this inner contradiction of law always remains, obviously continues to exist, therefore the prevalence and realization of law never can be perfect, complete and free of troubles. From the aspect of positive law this peculiar legal and sociological fact was observed by Hans Kelsen in a very witty and remarkable way: "The relationship which exists between validity and efficacy of a legal order—it is, so to speak, the tension between the "ought" and the "is"—can be determined only by an upper and lower borderline. The agreement must neither exceed a certain maximum nor fall below a certain minimum."[3] This assertion by Kelsen indicated two important legal and sociological points: on one hand it shows well, when the social behavioural patterns will be in complete harmony with the legal norms, i.e. the legal norms are followed and obeyed in every case—to put it philosophically the particularity of the social content of law becomes real social generality—the validity and existence of law cease at once, because it becomes unnecessary sociologically. On the other hand if the legal norms are broken so often that its prevalence could be regarded as minimal, the legal norm also loses its validity, because the competent organs of the state cannot enforce the legal prescriptions.

Talking about the connection between state and law, it is obvious, that now we are interested about that part of the Kelsen-norm, which talks about that case, when the harmony between the validity and the prevalence of law falls under the minimum. The reason for doing this we suppose the inner contradiction of law with the existence of law between the particularity of its social content and the generality of its validity. Consequently the existence of this contradiction necessarily involves the eventuality and existence of such human behaviours, which do not follow the law, but break it. It is also obvious that in case these illegal activities are sporadic, their number is negligible, this does not affect the validity of law. Furthermore the validity of the law also remains untouched in case of such illegal activities, which draw legal reprisals. And this is the very point, where the decisive role and importance of the state in connection with law comes to the attention. Namely the validity of law is given by the state and the state enforcement: the state with its enforcement agencies and institutions—as the prisons and other institutions—stands up fot the sake of the validity and prevalence of law and those sanctions, which are prescribed for illegal behaviour by law, are put into action by the state. The law can realize its actual regulatory function with the help of this enforcing power of the state. In this case there is not only the general prevalence of the state enforcement—directly and simply—what we are talking about, but what we have in mind the chance, which always exists, that the state generally prosecute the perpetrators according to the sociological experiences.

The role of the *state enforcement* in order to make the law prevail brings up two inseparable problems both sociologically and as far as the *validity of law* is concerned: on one hand it asserts that according to the inner contradiction of law those state

[3] KELSEN, H.: *General Theory of Law and State*, Cambridge (Mass.) 1949. 120 p.

measures and sanctions, which are used against the deviant and illegal behaviours, necessarily involve enforcement. I already mentioned that without the state-sponsored enforcement the existence and validity of law is inconceivable. Therefore the state enforcement is needed, from the aspect of validity and prevalence of law it is a necessary evil. On the other hand we also have to see that merely the enforcement apparatus and the enforcement itself from the state cannot assure the validity of law. Mutatis mutandis: for the connection between state and law we also can use the appropriate witticism of Talleyrand: "One can do everything with bayonets except of sitting on them". To put it in other words: the enforcement and power of the state is an indispensable precondition of the validity and prevalence of law, however merely the use of state enforcement itself cannot assure the (validity and) prevalence of law. This lack of completeness as far as the state enforcement is concerned in connection of the validity of law brings the attention to the factor, which—combined with the state enforcement—assures the troublefree and smooth prevalence of law. I am talking about the social base and the sociological content behind the law and in the law, as it is expressed by the law. It is not unintentional that I emphasized earlier the significance of the compromises between the divergent class and group interests in connection with the particularity of the social value content of the law. Now I have to add that naturally it is inseparable the extent of the social particularity of law and its place in the totality of the society, especially from the aspect of, validity and realization of law. If the social class, classes or groups, as the special link between the individual member of society and the generality of the society, which classes and groups create and support the law include such wide layers and spheres of the society that with the exemplary law-abiding behaviour they enforce the individuals, who belong to other classes, layers and groups of the society, then we can talk about such social base of the law, which—combined with the state enforcement—can assure the validity and prevalence of law. But if the political ruling class or group is narrow and closed compared to the totality of society—not to mention that case, when even inside that class there are significant tensions and controversies—and in case the political ruling class cannot put its interests into accord to other group or class interests, the sociological base of the law is getting weak, it get down so narrow that the law-abiding behaviours, which exist in that circle, are not able to influence the individuals, who belong to other classes in order to assure the prevalence of law for a longer time. Then the role and significance of the state enforcement and power increase. However in the long range the state enforcement cannot assure the validity of law without the proper social base, without such sociological medium, which is able to influence the totality of society with its social behaviour, moral views, legal consciousness and political creed. The form of the state intention, which is assured with state enforcement, namely the legal norm can declare any social content as generally valid law. But as I mentioned if the particularity of the social content of law getting too thin, it includes too narrow circle of human beings, the validity of the law of such social content sooner or later, slower or quicker vanishes. Such law, which contradicts or ignores the sociological conditions—no matter how

much the state enforcement tries to support it—sooner or later loses its validity. Mutatis mutandis it is true for the law too, what so properly was told by Thomas Mann about the tyrannical power:

"The mankind may bent in front of the success, the fait accompli of power, no matter, how did it develop. But basically it does not forget the inhuman ugliness, the violent and brutal injustice, which happened in its own sphere and without its sympathy finally no power or sly success cannot be durable."

Till now the relation between law and state was discussed mainly from the aspect of state enforcement support and assure the realization of law. In this relation the state, which supports the prevalence of law, appears as such organ, whose social aim is to assure the existence of society free of troubles, saving the society from devouring itself in its inner controversies. Therefore in that meaning the state is such a social objectivation, which is absolutely necessary for the social life and reproduction. As we have seen—the assurance of validity and prevalence of law is an organic part of this activity of the state. But as I referred to it, for the very reason that the state is able to fulfill its social role and task because it is an alienated public power with institutions, because it is a separable group of people, which possess efficient enforcing means, therefore in its objectivated form undoubtedly separates itself from the everyday life of the people, even more: it has its independent typical inner movements, interests and characteristics against the rest of the society, another aspect of state connected with society and the individuals of the society appears. Namely till now we discussed the case that the state makes sure that the society should not devour itself, now the question appears: what makes sure that the state does not devour the society. To put it shortly: there is the problem of defending the individual citizen, the member of the society against the raw, open violence of the state. Now we arrived to the rather delicate, paradox problem of the connection between state and law. We face the strange social and legal situation that we expect the realization and defense from the very same social institution, which actually may injure or endanger these rights. Namely that the state, which stands behind the law, assures the valid positive law even with force, including the citizen's rights prescribed by law on one hand, but this enforcement activity sometimes should have been conducted against itself, against its own organs. The legal form, that the law explicitly prescribe the rights of the citizens and the legal limits of state intervention and action as well, undoubtedly has an outstanding social importance. But as I have mentioned just now, we keep in mind that the prevalence of law, including the prevalence of citizen's rights, civil liberties then the validity and prevalence of those civil rights are becoming questionable, which in the history were injured or denied by the state itself, because the same state organs would have to stand up for the civil liberties, which break these rights. Now we know it very well that the division of the state power is merely a division of labour and it does mean the actual division of the state power at all, because in spite of every eventual inner contradiction, the state shows up as a unified power in front of the society. Followingly in the labour division of the state activity some institutions of the state, for example,

the court, the public prosecutor etc. have the duty prescribed by law to stand up against the injurers of civil rights, even in those case when they happen to be certain organs or representatives of the state. This process is not smooth and free of obstacles even in those cases when the citizens' rights are not injured by those state organs, which have the actual task of defending the civil liberties, but other state organs, which work on some other field of state activity just because the mentioned unity of state power. The case is even more problematic, if the rights of the citizen are injured in the very same jurisdictional activity and process, which would have the task to defend these rights. In such case the defense and the injury of the citizens' rights happen in the same activity sphere of the state. Of course this legal and sociological fact does not change a bit the importance and significance of the aim that the state must codify and assure legally the rights of the citizens' as widely and as detailed as possible, which rights exist against the state, too, on one hand, and the division of labour in the state activity and the actions of the state organs against each other in defending the civil liberties have tremendous social and legal importance as far as the validity and prevalence of the citizens' rights. Meanwhile it cannot be denied that in case the civil rights got injured by the state, there is a legal "vicious circle" (circulus vitiosus) comes to existence because the validity and prevalence of these rights are the aim of the state enforcement apparatus too. There is the outcome: in certain cases the state assurance and defense of the citizens' rights really get dubious, getting weaker or even cease to exist: this way it is proven that the law without the support of state enforcement is equal with nothing.

From all of these we can see that this problem—as any other problem of some part of the social complexity (economy, moral, aesthetics, etc.) cannot be understood and solved merely within the inner activity circle of these parts. In order to break through the paralyzing wizardry of the vicious circle, which sometimes emerges in the course of assuring the mentioned citizens' rights by the state, we have to cross the borders of the given social and political objectivations (law and state). The activity sphere of the legal and state objectivations have to be surpassed into the direction of the social totality, which includes these part-complexes, considering the basic social-ontological law that "the whole has priority against the parts, the whole complex against its partcomplexes."[4] If we take this necessary step, it will become obvious at once that the defense of law, especially the defense of civil rights and their assurance depends mainly on the social class, layer or group, which constitutes the social base and content of the law and state, depends on that sociological factor, political power and base, which rules the given society. For assuring the rights and civil liberties those political conditions are becoming decisive directly, which connect the ruling class or classes and groups with the other classes and layers of the society, furthermore with the state apparatus itself and the totality of the society. Therefore the sociological and political question arises that whether there is such a social-political power in the

[4] LUKÁCS, GY.: *A társadalmi lét ontológiájáról*, II. köt. (About the ontology of the social existence. Volume II.) Budapest, 1976. p. 286.

society, which is able to stand up against the eventual tyranny and overzealousness, or illegality of the state itself. As I have already mentioned, it is not sufficient to appeal for defending the citizens' rights to the state alone. This sociological-political fact, which has such a great importance in realizing the civil rights, brings about the following social alternative as far as the political conditions and the prevalence of law as a process are concerned: Either the political ruling class, classes, strata are so powerful in the society, that they are able to resist the state-incited injustices, which in the same time proves that the political rule of the society and the state are not necessarily the same, there are contradictions, even if the both are usually and basically in harmony with each other. Or in other case this social and political power actually supports and agrees with the activity of the state, which injures the civil rights. Then the defense of the rights of the citizens can be imagined only as a consequence of such social-political changes, in which against the politically ruling classes and groups, which controll the state such social and political powers gather, who are able to oust the state and political power either legally, or through non-legal, revolutional way and to develop such political and state power, which respects the civil rights. It is clear that this social-political progress, which influences the legal system too, exists in several grades and forms, from the resistance and movement against the state, the social reforms to the revolution. As far as the prevalence of law, especially as far as the prevalence of the rights of citizens are concerned, it is important, that the defense, realization and assurance of these rights do not depend solely on the state organs, the competent state enforcement, but through these factors and together with these ones they depend ultimately on the movement of the whole society, the social totality.

Некоторые аспекты соотношения государства и права

В. Пешка

Исходя из специального содержания права и его всеобщего действия автор изучает сложный социологический и юридический процесс, в котором право складывается и реализуется. Изучение осуществлено с такой точки зрения, что какую специальную и важную роль играет государство в этом процессе. В ходе этого автор подвергает конкретному анализу законодательную, правотворческую деятельность государства, общественные и государственные пределы данной деятельности, а также процесс реализации права и значительное содействие в этом государства, в особенности же его принудительной силы.

Einige Aspekte der Beziehung des Staates und des Rechts zueinander

V. Peschka

Ausgegangen von dem besonderen Inhalt und der Allgemeingültigkeit des Rechts untersucht die Abhandlung jenen komplizierten soziologischen und rechtlichen Vorgang, in welchem sich das Recht herausformt und realisiert, und zwar aus dem Gesichtspunkt der äußerst wichtigen Rolle des Staates in diesem Vorgang. Im Zuge dessen analysiert er die gesetzgebende und rechtsschaffende Tätigkeit des Staates in konkreter Form, die gesellschaftlichen und staatlichen Rahmen und Grenzen dieser Tätigkeit, sowie den Realisierungsvorgang des Rechts und die daran besonders stark mitwirkende zwingende Kraft des Staates.

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Die Persönlichkeitsrechte. Entwicklungstendenzen und Widersprüche

L. SÓLYOM

leitender wissenschaftlicher Mitarbeiter
Institut für Staats- und Rechtswissenschaften der Ungarischen Akademie der Wissenschaften

Die Studie ist als Einführung zu einer Untersuchung der theoretischen Grundlagen der Persönlichkeitsrechte geplant.

Teil II. bietet eine kritische Neubehandlung der in der sozialistischen Rechtswissenschaft bisher vordergründig diskutierten Probleme: des Zusammenhanges der Persönlichkeitsrechte mit den Vermögensverhältnissen, sowie der Beziehung zwischen der Generalklausel des allgemeinen Persönlichkeitsrechts und den einzelnen besonderen Persönlichkeitsrechten. Verf. stellt die These auf, daß der moderne Persönlichkeitsschutz gegen Ende des 19. Jh. wirtschaftlich begründet wurde und als Eigentümerschutz (als Ausgleich der Verschlechterung der Chancen einer Selbstverteidigung — im Sinne des Liberalismus) entstanden ist. Somit ist auch der damalige politische Inhalt des allgemeinen Persönlichkeitsrechts gegeben: es war eine der antiliberalen Generalklauseln. Demgegenüber können die besonderen Persönlichkeitsrechte als politisch neutral aufgefaßt werden.

Teil III. zeigt die gegenwärtigen Tendenzen des Persönlichkeitsschutzes auf. Die Entwicklung nach dem zweiten Weltkrieg ist durch die Politisierung und Verallgemeinerung der Persönlichkeitsrechte bestimmt, in dem Sinne, daß der zivilrechtliche Schutz mit den Grundrechten der Verfassung verbunden wird.

Im Teil IV. wird versucht, die Persönlichkeitsrechte durch ihre inneren Widersprüche zu charakterisieren. Im Spannungsfeld zwischen der Autonomie des Individuums und der Integration in die Gesellschaft können die Persönlichkeitsrechte — selbst Mittel des Schutzes und Quellen der Gefährdung — der Person einen erträglichen Bewegungsraum sichern.

I.

Der rechtliche Schutz der Persönlichkeit erscheint in aller Welt als dringende Aufgabe. Die Persönlichkeitsrechte werden auch in Ungarn als rechtspolitisch sehr wichtig angesehen. Dies bezeugt die umfassende und spektakuläre Neuregelung in der Novelle zum ungarischen ZGB von 1977., die fast alle früheren Bestimmungen erweiterte, und auch inhaltliche Neuerungen brachte. Das Ziel war die Belebung dieses Rechtsinstituts: die Novelle hob alle Hindernisse auf, die die Literatur als ursächlich für sein Nichtfunktionieren ansah. Man erklärte nämlich die geringe Zahl derartiger Prozesse damit, daß die Betroffenen von der Möglichkeit eines Zivilverfahrens nicht wußten, weiterhin, daß — eben im Falle eines Prozesses — die adäquate Sanktion fehlte, denn das ZGB kannte den Ersatz eines Nichtvermögensschadens nicht; und schließlich damit, daß die Generalklausel des allgemeinen Persönlichkeitsrechts wegen ihrer ungewöhnlichen Breite und Unbestimmtheit den Gerichten Schwierigkeiten

bereitete.[1] Die Novelle hat sich beeilt die „technischen" Hindernisse zu beheben: ein Ersatz von Nichtvermögensschäden wurde eingeführt, und der Katalog der „einzelnen, besonderen Persönlichkreitsrechte", die der Generalklausel im Gesetz folgen und sie konkretisieren, wurde detaillierter gefaßt bzw. erweitert.

Der direkte gesellschaftliche Anlaß für diese Aktualität der Persönlichkeitsrechte in Ungarn ist sehr schwer greifbar. Ganz allgemein können wir darin eine Wirkung des Demokratisierungsprozesses erblicken. Außerdem müssen wir den Einfluß des internationalen Aufschwunges des Persönlichkeitsschutzes als solchen Faktor nennen.[2] Die Einführung des Nichtvermögensschadens wurde von der juristischen Praxis sogar erzwungen. Als Grund dafür könnten wir die Veränderungen in der Wertordnung annehmen, die seit dem Experimentieren mit einem sozialistischen Marktmechanismus spürbar sind. Die Verbreitung der elektronischen Datenverarbeitung, und besonders die theoretischen Untersuchungen anläßlich der Pläne zur Komputerisierung der Staatsverwaltung haben glücklicherweise auch die damit verbundenen Gefahren bewußt gemacht. So bestimmt jetzt auch die Novelle, daß „die elektronische Datenverarbeitung die Persönlichkeitsrechte nicht verletzen soll" (§ 83). Es ist teils den Ansprüchen der ungarischen pharmazeutischen Industrie (d. h. den Problemen der klinischen Pharmakologie), teils aber wiederum der internationalen Aktualität des Themas zuzuschreiben, daß sich die Literatur mit persönlichkeitsrechtlichen Aspekten der ärztlichen Tätigkeit reichlich auseinandersetzte.[3]

Der Schutz der Persönlichkeit stellt also ein eindeutiges rechtspolitisches Ziel dar. Seine zivilrechtlichen Mittel — nun vervollkommnet — stehen zur Verfügung. Gleichzeitig haben wir aber vom Wesen und von den Möglichkeiten der Persönlichkeitsrechte nur oberflächliche und zerstückelte Vorstellungen. Es ist zu fragen, ob diese populären Auffassungen der Entfaltung des Persönlichkeitsschutzes als Grundlage dienen können.

[1] Erőss, P.: Emberi mivoltunk polgári jogi védelme (Zivilrechtlicher Schutz des Menschenseins) Magyar Jog, 1972. p. 688.; Törő, K.: A személyiségvédelem helye és szerepe a polgári jog rendszerében. (Stellung und Rolle des Persönlichkeitsschutzes im System des Zivilrechts.) Magyar Jog, 1970. p. 79.; Törő, K.: A személyiség polgári jogi védelme bíróságaink gyakorlatában (Der Persönlichkeitsschutz in der ungarischen Gerichtspraxis) Magyar Jog, 1971. p. 667.

[2] Dazu zwei wichtige Schlagworte: Persönlichkeitsrecht als Menschenrecht, bzw. Gefährdung der Privatsphäre durch die moderne Technik. Anstatt der unübersichtlichen Literatur S. den UNESCO-Bericht: International Commission of Jurists. The Legal Protection of Privacy: A Comparative Survey of Ten Countries. UNESCO International Social Science Journal, 1972. p. 417.; Max-Planck-Institut für ausländisches und internationales Privatrecht: Der zivilrechtliche Persönlichkeits- und Ehrenschutz in Frankreich, der Schweiz, England und den Vereinigten Staaten von Amerika. Tübingen, 1970.; reiches vergleichendes Material enthält der englische Report of the Committee on Privacy (sog. Younger-Report), London, 1972. Für die neuere sowjetische Auffassung s. den SammelbandМалейн(Red.): Гражданскоправовое положение личности в СССР. Moskwa, 1975. Zu einer völkerrechtlichen Regelung s. Murphy: An International Convention on Invasion of Privacy. New York University Journal of International Law and Politics, 1976. p. 387.

[3] Nizsalovszky, E.: A szerv- és szövetátültetések joga. (Das Recht der Organ- und Gewebetransplantation). Budapest. 1970.

Die theoretische Erfassung der Persönlichkeitsrechte ist in der sozialistischen Literatur herkömmlicherweise äußerlich. Sie wurde auf die Frage eingeengt, wie diese Nichtvermögensrechte in das Zivilrecht, also nach der herrschenden Lehre in das Recht der Warenverhältnisse eingeordnet werden können. Eben die Verbindung der Persönlichkeitsrechte mit den verfassungsmäßigen Grundrechten führte zu der Fragestellung, ob selbst die Persönlichkeitsrechte nicht eventuell dem Staatsrecht angehören.

Diese Studie möchte demgegenüber zu einer inhaltlichen Untersuchung der Persönlichkeitsrechte beitragen. Dies zieht nach sich, daß diese Rechte in die Entwicklung des ganzen Zivilrechts eingefügt werden müssen, inbegriffen besonders die „Politisierung" des Zivilrechts. Ihre erwähnte formelle Behandlung hängt nämlich damit zusammen, daß diese Theorie die Stelle der Persönlichkeitsrechte in einem herkömmlich aufgefaßten, „neutralen" Zivilrecht suchte. (Wie wir sehen werden, haben die Persönlichkeitsrechte eben in diesem — letzten Endes liberalen — Modell historisch keinen Platz.)

Während die Umwandlung des klassischen Zivilrechts auf dem Gebiet des Eigentumsrechts oder der Verträge mit allen ihren politischen Bezügen heute schon selbstverständlich ist — konnte die Theorie der Persönlichkeitsrechte keinen wirklichen, inhaltlichen Zusammenhang zwischen der vom Liberalismus ererbten abstrakten „Person", als Rechtssubjekt, und dem in den letzten hundert Jahren entwickelten und aufblühenden Persönlichkeitsrecht schaffen. Soll etwa die Hauptfigur der „autonomen Struktur" (wie Eörsi die Welt des Zivilrechts kennzeichnet[4]) — auch im 20. Jahrhundert seine Eigenschaft als citoyen verleugnen? Und nachdem die sozialistische Theorie endlich die Unabhängigkeit der Persönlichkeitsrechte von den vermögensrechtlichen Verhältnissen anerkannte, bleibt diese „Person" des Zivilrechts weiterhin ein „denaturierter" Bourgeois, der allen menschlichen Eigenschaften entkleidet ist? Die Studie wird jedoch nicht auf das Verhältnis der „verfassungsrechtlichen" und „zivilrechtlichen" Persönlichkeitsrechte, oder auf die Drittwirkung der Grundrechte eingehen. Sie hat — was ihr Ziel betrifft — die eigene, inhärente Politik des zivilrechtlichen Persönlichkeitsschutzes zu entwickeln, und so die Frage nach der Funktion und den Perspektiven dieser Rechte aufzuwerfen.

Zur Einführung befassen wir uns mit zwei dogmatischen Problemen, die in der sozialistischen Rechtswissenschaft eigentlich als Hauptfragen der Persönlichkeitsrechte betrachtet werden. Wir werden sehen, daß schon durch die angezeigte Akzentverschiebung in der Fragestellung auch diese Probleme, d. h. einerseits der Zusammenhang der Persönlichkeitsrechte mit den Vermögensrechten, und andererseits das Verhältnis zwischen dem allgemeinen Persönlichkeitsrecht und den einzelnen besonderen Persönlichkeitsrechten, zu wichtigen inhaltlichen Erkenntnissen führen können.

[4] Eörsi, Gy.: A szocialista polgári jog alapproblémái. (Grundprobleme des sozialistischen Zivilrechts) Budapest, 1965, p. 27.; Eine Zusammenfassung der sowjetischen Rechtsentwicklung gibt Йоффе: Развитие цивилистической мысли в СССР. Leningrad, 1975. pp. 77. ff., 91. ff., und 116. ff.

II.

1. Der Zusammenhang der Persönlichkeitsrechte mit den Vermögensverhältnissen

a) Für die sozialistische Rechtswissenschaft stellte sich als Hauptproblem der Persönlichkeitsrechte die Frage, wie diese in das die Vermögensverhältnisse regelnde Zivilrecht eingegliedert werden können. Und die Hauptleistung dieser Wissenschaft war, daß sie die Unabhängigkeit der Persönlichkeitsrechte von den Vermögensverhältnissen begründete.

Mit diesem Ergebnis müssen wir einverstanden sein. Wir behaupten sogar, daß der wichtigste Zug der neueren Entwicklung der Persönlichkeitsrechte die Emanzipierung des Schutzes von der Eigentümerposition der Person war. Am Anfang der gegenwärtigen Periode der Entfaltung des modernen Persönlichkeitsschutzes, d. h. am Ende des vorigen Jahrhunderts, — abgesehen von einigen „zeitlosen" Injurien, die modernisiert werden sollten — dienten alle neubegründeten Persönlichkeitsrechte in der Tat der Sicherung von wirtschaftlichen Positionen.[5] Ihr „Nichtvermögens"-Charakter war von der damaligen fortschreitenden Immaterialisierung vermögensrechtlicher Stellungen untrennbar. Das Wettbewerbsrecht und das Persönlichkeitsrecht waren anfangs auch formell verflochten. Dieselbe Schutzaufgabe aber, die hinsichtlich der wirtschaftlichen Stellung schon offensichtlich war, wurde nur zögernd auf die Position der von dieser Beziehungen unabhängig aufgefaßten Person erweitert, d. h. auf den Schutz des Menschen vor nicht nur wirtschaftlicher, sondern auch politischer, organisationeller usw. Übermacht. Diese breitere Schutzgewährung ist aber schon ein Zeichen des Funtionswandels des Zivilrechts selbst.

Paradoxerweise geht es für die sozialistische Rechtswissenschaft nicht um diesen Prozeß, wenn sie vom Zusammenhang mit und Verselbständigung von den materiellen Verhältnissen spricht — sondern um einen rein rechtsdogmatischen Streit, der in unserem Falle schon in sich zum Konservativismus neigt, umso mehr, als er die Stelle der Persönlichkeitsrechte in einem herkömmlicherweise aufgefaßten Zivilrecht sucht. (Für die „sozialistische Rechtswissenschaft" ist auf diesem Gebiet die sowjetische Theorie repräsentativ: sie hatte bestimmenden Einfluß, und hinsichtlich des Umfangs der Produktion ragt sie weit über die Literatur anderer sozialistischer Länder hinaus.)

Bis zum Ende der 1950-er Jahre konnten die Persönlichkeitsrechte die Einheitlichkeit „des Gegenstandes des Zivilrechts: der Vermögensverhältnisse" nicht einmal in Frage stellen. Daraus folgte die Aufgabe, daß man wenigstens einen „Zusammenhang" der Persönlichkeitsrechte mit den Vermögensverhältnissen nach-

[5] In dieser Studie verstehen wir unter „Persönlichkeitsrecht" die im letzten Drittel des 19. Jh. zustandegekommenen „modernen" Persönlichkeitsrechte, die nicht in aller Rechtsordnung mit dem herkömmlichen Ehrenschutz Einheit bildeten. Der Ausdruck Persönlichkeitsrecht (und in Amerika das privacy) wurde anfangs nur für diese neuen Rechte vorbehalten.

weise. Dementsprechend waren die sog. „reinen" Persönlichkeitsrechte entweder vom Zivilrecht ausgeschlossen, oder aber mit überspannten Verallgemeinerungen ohne Anerkennung ihres eigenen Wertes darin erhalten geblieben. Erst nachdem die „Grundlagen der Zivilgesetzgebung der Unionsrepubliken" 1961 den Schutz der Ehre und der Würde vorgeschrieben haben (und einige Republiken diesen Schutz noch auf manche klassische Rechte erstreckt haben, wie auf den Schutz von Tagebuchaufzeichnungen) änderte sich die Aufgabe der Wissenschaft. Diese Rechte wurden jetzt als „Unabhängig von den Vermögensverhältnissen" aufgefaßt, es galt also ihre Zugehörigkeit zum Zivilrecht in ihrer dieser Eigenschaft zu begründen. Da aber die Konzeption des Zivilrechts unverändert blieb, mußte die Erklärung formell ausfallen. (Z. B.: Die Persönlichkeitsrechte werden aus bloßen Zweckmäßigkeitsgründen im Zivilrecht reguliert; oder: die reparative Sanktion bzw. „die Methode der Regelung" verknüpft sie mit dem Zivilrecht. Am meisten entwicklungsfähig wären diejenigen Auffassungen, die die persönlichen und die Vermögensverhältnisse in der „autonomen Struktur" des Zivilrechts auf gemeinsamen Nenner brachten, zu einer tieferen Auseinandersetzung ist aber diesbezüglich nicht gekommen. Auch die historische Betrachtung kam nur insoweit zu Wort, als — wie es hieß — das ursprünglich für die Warenverhältnisse ausgebaute Zivilrecht „infolge der relativen Selbständigkeit der rechtlichen Form" sich mit der Zeit auch auf Nichtvermögensverhältnisse erstreckte.)

Diese Laufbahn der Persönlichkeitsrechte im sowjetischen Zivilrecht ist durch geschichtliche und ideologische Ursachen bedingt, die wir hier nicht einmal andeutungsweise vorführen können. Nur ein Faktor soll kurz berührt werden, um zu veranschaulichen, wie die Persönlichkeitsrechte mit der Konzeption der gesellschaftlichen Aufgaben des Zivilrechts untrennbar verbunden sind. Das Persönlichkeitsrecht wurde in der Sowjetunion zum ersten Mal in der Zeit anerkannt, als auch das Zivilrecht, dessen Existenzberechtigung im Sozialismus bis dahin bestritten wurde, gegenüber der aus anderen Gründen zurückgedrängten Konzeption des Wirtschaftsrechts, am Ende der 30-er Jahre selbst offizielle Anerkennung fand. Im Gegensatz zum Wirtschaftsrecht, das nur Kollektive kannte, und das Individuum verneinte, betonte man die Bedeutung der Persönlichkeit, und der „Rechte des wahren, lebendigen Menschen" für das Zivilrecht. Andererseits wurde durch diese Gegenüberstellung die „klassische", „Warenverhältnis"-Struktur des sozialistischen Zivilrechts auch geprägt.[6] In der Theorie des Persönlichkeitsrechts hätten diese zwei Gesichtspunkte abgestimmt werden müssen, was aber wegen der historischen Andersartigkeit der beiden Komponente nicht gelingen konnte. Der eigentliche wirtschaftliche Zusammenhang der Persönlichkeitsrechte, d. h. der Schutz der „wirtschaftlichen Persönlichkeit" konnte in den diesbezüglichen Diskussionen nicht geklärt werden, solche Gedanken waren dem damaligen System der Planwirtschaft fremd, und tauchten auch deswegen nicht auf, da das sozialistische Recht die geschichtlich hierzu gehörenden sozialen Probleme in anderen Konstruktionen gelöst hat.

[6] Vgl. Sólyom, L.: The Decline of Civil Law Liability. Alpen aan den Rijn/Budapest, 1980. Kap. VI.

Auch unter solchen Umständen hatte der neue Standpunkt von der Verneinung eines Zusammenhanges zwischen Persönlichkeitsrecht und Vermögensverhältnissen eine positive Rolle: Der Kreis der geschützten Rechte konnte von den „materiellen Aspekten" unbehindert erweitert werden. In der sowjetischen Literatur kann man wieder über die Notwendigkeit eines allgemeinen Persönlichkeitsrechts,[7] oder wenigstens über das Recht auf die Privatsphäre[8] lesen. Solange wie diese Rechte jedoch in einem Zivilrecht von klassischer Struktur (und vor „klassisch" funktionierenden Zivirgerichten) ihre Stelle suchen müssen, ist die Ansicht folgerichtig, die den Persönlichkeitschutz im ganzen dem Verfassungsrecht zuweist.[9]

b) In Ungarn hatte der Widerspruch der Konzeptionen vom „Zivilrecht" und von „Persönlichkeitsrechten" keine Folgen.[10] Der „materielle Zusammenhang" ist als stereotype Erklärung in den Schulbüchern verblieben. Das ZGB erkannte schon 1959 das allgemeine Persönlichkeitsrecht an, und seine Novelle aus 1977 zeigt auch die prinzipielle Unabhängigkeit der Persönlichkeitsrechte. Andererseits erlangten bei der Novellierung auch die wirtschaftlichen Aspekte der Persönlichkeitsrechte gewisse Betonung: der Schutz wurde auf juristische Personen im allgemeinen erstreckt, auch Geschäftgeheimnisse und gewerbliche Rechte im allgemeinen wurden hier geregelt. Inzwischen ist aber die eigentliche Frage, der Zusammenhang mit den Vermögensverhältnissen als ein dogmatisches Problem, in Vergessenheit geraten, was nur zu begrüßen ist.

Doch kann das Verhältnis der Persönlichkeitsrechte zu den Vermögensrechten nicht einfach außer Acht gelassen werden. Die Frage ist sowohl theoretisch interessant, als auch — wenn richtig gestellt — eine Grundfrage des Instituts des Persönlichkeitsrechts.

c) Der Zusammenhang mit einem Vermögensverhältnis ist bei zahlreichen Persönlichkeitsrechten offenkundig (wie z. B. beim Autorenrecht, oder dem geschäftlichen Name). Der allgemein verbreiteten Ansicht nach sollte die Anerkennung des gegebenen materiellen Interesses die ältere sein, deren Schutz später bis zum immateriellen Recht hin erweitert wurde. Von näher betrachtet stellt sich aber heraus, daß dieser Prozeß keineswegs automatisch ist; es geht um die Wirkung historischer Kräften, durch die die erwähnten Schutzerweiterungen verursacht wurden, und erklärt werden können.

Die geschichtlichen Zusammenhänge können am Beispiel des allgemeinen Persönlichkeitsrechts erläutert werden, obwohl die wirtschaftlichen Aspekte gerade

[7] MALEIN, p. 29. Als eine Reaktion gegen die wirtschaftsrechtliche Schule, war das Verlangen nach einem allgemeinen Persönlichkeitsrecht in der Sowjetunion Ende der 30-er Jahre ganz allgemein. — Der „Kompromiß" mit der Zivilrechtskonzeption bedeutete die Betonung des „Zusammenhanges mit den Vermögensverhältnissen".

[8] СУХОВЕРХИЙ: О развитии гражданскоправовой охрани личных неимущественных прав и интересов граждан. Правоведение, 1972. 3. p. 27.

[9] ВОЕВОДИН: Содержание правового положения личности в науке советского государственного права. Советское Государство и Право. 1965/2.

[10] Die Ablehnung des Ersatzes des immateriellen Schadens wurde mit dieser Frage nicht verknüpft.

dieses Rechtes gewöhnlich nicht erwähnt werden und dieses Recht häufig für die Ideologie einer den materiellen Werten gegenübergestellten „Persönlichkeit" reserviert zu sein scheint. Zur Zeit und am Ort des Entstehens des allgemeinen Persönlichkeitsrecht (Schweiz, Ende des 19. Jh.), war das Übergewicht des direkt wirtschaftsbezogenen Persönlichkeitsschutzes eindeutig. § 55 des alten Obligationenrechts, der 1881 für die „Verletzung in persönlichen Verhältnissen" einen Anspruch auf Genugtuung im Geld gewährte, wollte eigentlich das Recht des Ersatzes des Nichtvermögensschadens in der Schweiz eidgenössisch vereinheitlichen und erweitern. Die zeitgenössischen Entscheidungen des Bundesgerichts bezeugen aber, daß neben wenigen zeitlosen Injuriensachen (Verleumdung, Verletzung der Ehre) die überwiegende Mehrheit der Prozesse wegen Boykottes eingeleitet wurde. Eben in einem solchen Fall hat das BG allgemein „das Recht auf Würde und Geltung der Persönlichkeit" anerkannt.[11]

Die schweizer Boykott-Entscheidungen — als Repräsentanten der Praxis — zeichnen die allgemeinen Änderungen ab, die auch die moderne Phase der Persönlichkeitsrechte beginnen ließen. Die Anerkennung des Schutzes der Persönlichkeitsrechte bedeutete inhaltlich nicht weniger, als einen staatlichen Eingriff in die freie liberale Wirtschaft. Nicht nur die erwähnte Rechtsprechung, sondern auch die Materialien der Kodifikation und die Literatur sprechen dafür. Laut Huber ist der Schutz der Persönlichkeit die Grundlage „der ganzen sozialen Gesetzgebung"[12], und schon zur Zeit der Vorbereitung des Zürcher Privatrechtlichen Gesetzbuches, in den 1850-er Jahren, wurde die allgemeine Regel über den Arbeiterschutz (d. h. Arbeitsschutz) auf ihn gegründet.[13]

Das allgemeine Persönlichkeitsrecht war also sowohl hinsichtlich seines Anlasses und seiner Ideologie, als auch in der Praxis ein „Schutzinstitut", das in wirtschaftlich ungleichen Situationen — mit dem heute gängigen Ausdruck — den „Schwächeren" schützte. Sein politisches Modell ist das gleiche, wie das der (zu jener Zeit sich verbreitenden) objektiven Haftung und des Wettbewerbrechts.[14]

Diese wirkliche Verbundenheit des allgemeinen Persönlichkeitsrechts mit den Vermögensverhältnissen zeigt uns das Politikum der frühen Persönlichkeitsrechte, zugleich aber auch ihre Grenzen. Sie führt uns zu der Erkenntnis, daß das allgemeine

[11] BG. 32/2. 367. (1906). — Das Recht der Persönlichkeit auf Geltung in dem Wirtschaftsverkehr wurde vom BG schon 1896 anerkannt.

[12] HUBER: Das schweizerische Zivilgesetzbuch und die Presse. Jahrbuch der schweizerischen Presse, 1905/1906. p. 32, 35.

[13] KELLER: Rechtsethik und Rechtstechnik in der modernen kontinentaleuropäischen Zivilgesetzgebung, am Zürcher Privatrechtlichen Gesetzbuch erläutert. Aarau, 1947. p. 120.

[14] Hier müssen wir den sehr variablen Inhalt der Persönlichkeitsrechte und ihre Verwendbarkeit für sehr verschiedene Zwecke merken — d. h. ihre Züge, die von den anderen neuen Rechtsinstituten abweichen. Für solche „übernommenen Funktionen" gibt das schweizerische Recht schon früh Beispiele. Die Theorie faßte z. B. folgende als Persönlichkeitsrechtschutz auf: Schadenersatz für Eisenbahnunfall, Anfechtung des Vertrages wegen Irrtum, Nichtigkeit von lebenslängigen Vertragsverhältnissen, sowie viele der Gleichberechtigung dienende, und noch mehr der konservativen Regeln des Familienrechts.

Persönlichkeitsrecht durch das Schutzbedürfnis gegen sozial ungerecht empfundene Wirkungen des liberalen Systems begründet wurde. Doch kann man sofort sehen, daß die Schutzfunktion begrenzt war: gegenüber ihrem theoretisch sehr weitgefaßten Aufgabenkreis beschränkte sie sich praktisch nur auf den Schutz einiger Aspekte der wirtschaftlichen Persönlichkeit. (Daneben deckte dieses Institut nur die — aus unserem Gesichtspunkt jetzt unwichtigen — Ehrenverletzungen.) Es mag ein Zufall sein, daß sich das allgemeine Persönlichkeitsrecht in der Schweiz eben im Zusammenhang mit der Boykott-Rechtsprechung stabilisieren konnte (was dadurch gefördert wurde, daß das alte Obligationenrecht ein Handelsgesetzbuch war). Wenn wir aber das Prinzip suchen, das dieser Praxis wie auch den nur theoretisch formulierten Schutzaufgaben zugrunde legt, so besteht es darin, daß diese frühen Persönlichkeitsrechte die Person als Eigentümer schützen. Dadurch unterscheidet sich das allgemeine Persönlichkeitsrecht des OR vom heutigen. Die staatliche Intervention rechnete mit der liberalen Konzeption ab, daß die Gesellschaft der Selbstregulierung des Marktes überlassen werden könnte. Darin hatten auch die Persönlichkeitsrechte ihre Rolle — ohne aber die Liquidierung jener Seite der liberalen Konzeption, daß der Mensch der in seinem Eigentum gegebenen Garantie überlassen werden konnte. So korrigierte der Schutz der „wirtschaftlichen Persönlichkeit" nur die Ungleichheit der Eigentümer-Positionen — man könnte sagen: er glich die Verschlechterung der Chancen der Selbstverteidigung aus.

d) Auch die besonderen Persönlichkeitsrechte des ausgehenden 19. Jahrhunderts, das Recht am eigenen Bild und Namen, zeigen klar die Verbindung mit den Vermögensverhältnissen, bzw. mit deren Wandlung. Die Anerkennung des Rechts am eigenen Namen bedeutete den Schutz des Handelsnamens, und bald seine Erweiterung auf den Namen schlechthin. Darin wirkte nicht nur die so charakteristische Immaterialisierung von Wirtschaftspositionen mit, sondern auch die Streiten um die Rechtsstellung der unehelichen Kinder.[15] In Amerika meldeten sich massenhafte Ansprüche auf Bild- und Namensschutz wegen der unerlaubten Nutzung von Bildnissen und Namen für Reklamzwecke. Die Schutzgewährung war nicht nur vom Staat zu Staat unterschiedlich, sondern auch — sehr unerwartet — innerhalb der einzelnen Staaten. Dahinter aber stand dieselbe Grundsatzfrage, wie hinter dem allgemeinen Persönlichkeitsrecht in der Schweiz. Die Anerkennung eines Rechts an eigenem Bild war nämlich davon abhängig, ob das Bild „für Handelszwecke verwendet wurde", also auf diese Weise letzten Endes davon, ob man eine Intervention in die Freiheit des Wettbewerbes (d. h. als dessen Mittel, der Reklame) zulässig hielt.[16]

Auch die theoretische Erklärung dieser neuer Rechte verwendete anfangs Analogien zum Eigentumsrecht. Das lag auf der Hand: diese — wie sie Cohn in seiner damals berühmten Studie genannt hat — „neuen Rechtsgüter" erschienen von der Person abgetrennt als „Sache"; ein Bild, eine Schallplatte.

[15] COHN: Neue Rechtsgüter. Das Recht am eigenen Namen. Berlin, 1902.
[16] WINFIELD: Privacy. The Law Quarterly Review, 1931. p. 23, 35. ff.

2. Die einzelnen, besonderen Persönlichkeitsrechte und die Generalklausel des allgemeinen Persönlichkeitsrechts

a) Natürlich gab es solche Teilbereiche der Persönlichkeitsrechte, die durch die Epochenwende, die Liquidierung des Liberalismus unmittelbar nicht berührt wurden, so z. B. die uralte Injuria der Ehrverletzung. Selbst die Verletzung des Rechts am Bild und am Namen kann als Ehrverletzung aufgefaßt werden. In der Schweiz lösen die Gerichte den Schutz des Bildnisses bis heute auf diese Weise.

Es ist wahr, daß die neuen technischen Mittel, wie Fotografie und das „Grammophon", andererseits die gesellschaftlichen Neuigkeiten, wie die Reklame und die Unterhaltungs- und Klatschpresse, die Gefährdung der Kontrolle der — bis dahin gesicherten — Verfügung über das eigene Bild und den Namen erheblich vergrößert haben. Diese Gefährdung war, im Gegensatz zur Gefährdung der sog. wirtschaftlichen Persönlichkeit und zu den damit verbundenen zunehmenden Eingriffen des Staates in das Wirtschaftsleben, unpolitisch. Die heute sog. klassischen Persönlichkeitsrechte — Ehre, guter Ruf, Recht am Namen und am eigenen Bild — sind *politisch neutral.*

Die „Neutralität" wird auch durch ihre Geschichte belegt. Die Tatbestände der rein persönlichen Delikte (wie z. B. Ehrverlehrung) unterscheiden sich im wesentlichen nicht von den Injurien des antiken Roms. Sie waren es, die am längsten ihre archaischen Züge beibehalten haben. Sie wurden von der Umwandlung des alten Deliktrechts zu reinem zivilrechtlichen Institut nicht mitgerissen. In ihnen erfolgte die Trennung der zivil- von den strafrechtlichen Elementen nur aus eigentlich äußerlichen Gründen, anläßlich der Modernisierung des Strafrechts am Ende des 19. Jh. (aber dann zugunsten des Strafrechts).[17] Wegen ihrer Neutralität konnten die klassischen Persönlichkeitsrechte in *alle* Zivilrechtsordnungen aufgenommen werden. Ihre Einfügung in das Zivilrecht ist unbedenklich, da sie für die meist konservative Zivilrechtspflege keine Funktionsstörung bedeuten, obwohl sie theoretisch nicht hineinpassen. (Diese Neutralität läßt natürlich den Klassencharakter des Rechts unberührt, was zahlreiche Fälle zeigen, in denen sich die Höhe der Genugtuung für Ehrverletzungen nach der Klassenzugehörigkeit der Verletzten richtete.)

Demgegenüber ist *das allgemeine Persönlichkeitsrecht seinem Wesen nach politisch.* In der Schweiz entstand es als Ausdruck ausgesprochen antiliberaler Tendenzen. In Ungarn wurde das Persönlichkeitsrecht nicht so verwendet, da das Wettbewerbsrecht und die Anfänge eines Sozialrechts in speziellen Normen niedergelegt wurden. Trotzdem sind auch hier auf Persönlichkeitsschutz gegründete wettbewerbsrechtliche Urteile zu finden. Das allgemeine Persönlichkeitsrecht spielte

[17] In Frankreich wurde der zivilrechtliche Anspruch in Adhäsionsverfahren verhandelt, Voraussetzung des Schadensersatzes war der Vorsatz. Nach altem ungarischem Injurienrecht (bis 1880) bekam der Verletzte einen Teil der Geldbuße. Nach Inkrafttreten des StGB wurden die strafrechtliche Schuld und der Vermögeschaden Voraussetzung eines zivilrechtlichen Anspruches.

in Ungarn eine vorwiegend deklarative Rolle. Einerseits sollte es aussagen, daß der Schutz der Persönlichkeit nicht auf die (schon praktizierten) klassischen Rechte beschränkt, sondern grundsätzlich unbegrenzt ist. Anderseits figurierte es als ein Symbol der modernen d. h. antiliberalen und sozialen Konzeption der privatrechtlichen Kodifikation. Dies geht aus den verschiedenen Entwürfen des Allgemeinen Bürgerlichen Gesetzbuches Ungarns, sowie aus den Protokollen des Kodifikationsausschusses sowie aus der Literatur klar hervor. „Eine auf richtigen Grundlagen beruhende Rechtsordnung kann sich nicht auf den Schutz von Vermögenswert darstellenden Gütern der Personen beschränken, sie soll höheren ethischen Gesichtspunkten entsprechend auch solche Güter der Personen schützen, die eventuell nur einen rein ethischen Wert haben, aber eben als solche, für jedermann wertvoller sein können, als die Vermögenswerte" — steht in der Begründung zum Entwurf 1901. Und die Theorie bewahrte noch lange eine solche abstrakte Gegenüberstellung des Persönlichkeitsrechts mit dem „schroffen Materialismus" des Liberalismus.[18] Unter dem Vorwand abstrakter Werte ging es aber auch hier um die Intervention in die Wirtschaft und um die Arbeiterfrage. Der Kodifikationsausschuß betonte, daß der Persönlichkeitsschutz auch der Entfaltung und Geltung der Persönlichkeit im „gesellschaftlichen" — d. h. nach den angeführten Beispielen im wirtschaftlichen — Leben dienen soll, weiterhin, daß für den Schutz der berechtigten Interessen der Arbeiterschaft auch mittels der Persönlichkeitsrechte zu sorgen ist: „gesellschaftsgefährdenden Tendenzen können wir nur so Einhalt gebieten". Unter Hinweis auf Anton Menger schreibt Meszlény, ein Vorkämpfer der Persönlichkeitsrechte in Ungarn, daß diese „aus dem Gesichtspunkt des gesellschaftlichen Kampfes" bedeutend sind, sie schützen die Interessen der Besitzlosen gegenüber den Wohlhabenden.[19]

Die Gegenüberstellung „neutrale klassische Rechte" — „politische Generalklausel" ist für die formative Periode des Persönlichkeitsschutzes bezeichnend. Das Schema ist natürlich zu grob. Beispielweise ist in der — zum Schlagwort „Persönlichkeitsrecht" nachträglich zusammengestellten — französischen Rechtsprechung[20] das Wogen der Säkularisierung klar zu verfolgen. Ein anderes Beispiel ist die häufig vorkommende Nichtigkeitserklärung von die verschiedenen (Gewissen-, Bewegungs-

[18] MESZLÉNY, A.: A személyiség védelme (Der Persönlichkeitsschutz). Magyar Jogászegyleti Értekezések, XVI. 7. (217). Budapest, 1903. p. 289, 295. Auf diesem Weg kommt BALÁS, P. E. zu einer vollständigen Trennung der persönlichen und Vermögensrechte. Személyiségi jog (Persönlichkeitsrecht) in: Szladits (Red.): Magyar magánjog (Ungarisches Privatrecht) I. Budapest, 1941. p. 625.

[19] MESZLÉNY, A.: Magánjog-politikai tanulmányok (Zivilrechtspolitische Studien). Budapest, 1901. p. 33, 57. Während der „Verhandlungen des Kodifikationsausschusses über die Hauptfragen des Entwurfes des Allgemeinen Bürgerlichen Gesetzbuches Ungarns" (Bd. I. Budapest 1909, p. 31.) warf man die Anwendung der Persönlichkeitsrechte nicht nur für die Arbeiter, sondern auch gegen sie auf: wenn die Arbeiter die Entlassung von Streikbrechern oder „ihnen nicht gefallenden Angestellten" erzwingen, sollte die Gewerkschaft diesen Schadenersatz leisten, denn sie habe ihre „Erwerbstätigkeit", d.h. ihr Persönlichkeitsrecht angegriffen.

[20] In Frankreich wurde die Kategorie Persönlichkeitsrecht erst vom ersten Jahrzehnt des 20 Jh., und bis 1970 nur von der Theorie angewendet.

oder Eheschließungs-) „Freiheite" beschränkenden verträglichen und letztwilligen Bedingungen wegen Verstoßes gegen die ordre public. Auch in der Schweiz wird auf die antifeudale Tendenz der „Unbeschränkbarkeit der Freiheiten" hingewiesen (worunter die Nichtigkeit des lebenslängigen Dienstvertrages zu verstehen ist). Aber solche Beispiele machen das von den Persönlichkeitsrechten oben entworfenen Bild nicht verzerrt, vielmehr beleben sie es. (Sie heben die Einseitigkeit der Vorstellung eines „neutralen Liberalismus" hervor, — von dem wir ja in unserem Schema ausgingen. Die Verteidigung gegen den Marktmechanismus und die Ausbreitung des Marktes auf die ganze Gesellschaft fielen schon zeitlich zusammen. Nennen wir ein technisches Beispiel: es is gerade das klassische Muster der liberalen Haftungsrechte, das französische Recht, in dem sich schon von 1830 ab die Billigkeitspraxis des Ersatzes eines moralischen Schadens entwickelte.)

Die Politisierung der Persönlichkeitsrechtsprechung (und des ganzen Zivilrechts) im Laufe des 20. Jahrhunderts macht den Gegensatz „neutral—politisch" relativ. (Jedes genügend weit interpretierbare Recht kann eine politische Funktion haben). So hat sich in den USA das „privacy" — ursprünglich für den Schutz des Bildes und guten Rufes zustandegebracht — mit der Zeit die gleiche Rolle erworben, wie auf dem Kontinent das allgemeine Persönlichkeitsrecht. Auch wenn für die Gegenwart die Verwischung der Grenzen des Unpolitischen charakteristisch ist, können wir auch heute zu dem originellen Gegensatzpaar der neutralen und politischen Persönlichkeitsrechte Beispiele finden. Diese Beispiele zeigen immer, daß der Persönlichkeitsschutz (und die Konzeption der gesellschaftlichen Funktion des Zivilrechts) noch traditionell sind.

b) Die These kann im ungarischen Recht auf die Probe gestellt werden. Das ungarische ZGB von 1959 enthielt außer den klassischen Persönlichkeitsrechten nicht nur die, im ungarischen Recht schon bekannte Generalklausel des allgemeinen Persönlichkeitsrechts, sondern nahm auch das Verbot der Diskriminierung, und der Verletzung der Gewissens- und persönlichen Freiheit auf. In der Praxis lebten aber nur die klassischen Rechte (und diese auch kaum) — weder die erwähnten politischen Rechte, noch die Generalklausel wurden angewandt. (Die letztere lehnte man ausdrücklich ab: obwohl hier ausnahmsweise die Möglichkeit gegeben war, neue besondere Persönlichkeitsrechte anzuerkennen, erwarteten die Gerichte die Bestimmung solcher Rechte vom Gesetzgeber).[21] Aus der Begründung zum ZGB und auch aus der Literatur geht hervor, daß man mit einer über den Schutz der klassischen Rechte hinausgehenden Verwendung dieses Instituts nicht rechnete. Auch die dogmatischen Erklärungen des Verhältnisses des zivilrechtlichen Persönlichkeitsschutzes zu dem straf- und verwaltungsrechtlichen verraten, daß man nur an die Auseinandersetzungen von Bürgern untereinander dachte (deswegen hätten die Rechtswege in einem Schutz vor den „gesellschaftlichen Gerichten" vereinigt werden können.[22]) Die aktuelle Aufgabe des Persönlichkeitsrechtes, der Schutz vor politischer

[21] Vgl. Erőss, P. op. cit.

[22] Vgl. Begründung zum ungarischen ZGB (1959); Eörsi, p. 28—29.

und organisatorischer Übermacht, tauchte in den 60-er Jahren nicht einmal auf. Zeichen einer Änderung zeigt erst die Novelle des ZGB — wovon schon die Rede war.

Das Zivilrecht der Sowjetunion schützt nur wenige klassische Persönlichkeitsrechte. Gegen die Generalklausel des allgemeinen Persönlichkeitsrechts erhob man den Einwand, sie bedeute richterliche Rechtssetzung. Der Persönlichkeitsschutz wurde neuerlich auch rechtspolitisch für wichtig erklärt. Dies wurde jedoch nicht mit einer Revision der Aufgaben des Zivilrechts und der Zivilgerichte begleitet. Dieser Widerspruch erklärt unserer Meinung nach die theoretischen Stellungnahmen zum Persönlichkeitsrecht. Mann stellt z. B. den Persönlichkeitsschutz aus verschiedenen Rechtszweigen mosaikartig zusammen. Auch wenn neulich die Anerkennung und der Schutz der Privatsphäre, sogar die Anerkennung des allgemeinen Persönlichkeitsrechts verlangt wird, versteht man darunter *alle* klassischen Rechte, bzw. höchstens die Einführung des Ersatzes für immaterielle Schäden, im Bereich von ausdrücklich nichtpolitischen persönlichen Verhältnissen.[23] Von den Vermögensverhältnissen unabhängige politische Rechte gehören weder der alten, noch der neuen Auffassung nach zum Zivilrecht. Die neueste Ansicht, die auch solche Rechte zu den Persönlichkeitsrechten zählt, weist den ganzen Persönlichkeitsschutz dem Staatsrecht zu.[24]

III.
Die Politisierung der Persönlichkeitsrechte

1. Die Untersuchung des Zusammenhanges der Persönlichkeitsrechte mit den Vermögensverhältnissen in ihrer modernen Entfaltungsperiode führte zu der Erkenntnis, daß zu dieser Zeit die Entwicklung durch diese Verbindung bestimmt war. Der Zusammenhang mit den Vermögensverhältnissen, d. h. der Schutz der immateriellen Wirtschaftsposition hat das Institut des Persönlichkeitsrechts (dessen früherer Bestand, die Injurien, infolge der Modernisierung des Strafrechts für das Zivilrecht kaum noch die geringste Bedeutung hatten) neu belebt und wichtig gemacht, indem der Persönlichkeitsschutz auf diese Weise am ökonomischen und politischen Ereignis der Auflösung des Liberalismus und des Aufbaues des Monopolkapitalismus Anteil erlangte. Selbst klassische Persönlichkeitsrechte verrichteten Eigentümerschutz, und diese Eigenschaft erleichterte die Ausweitung des Schutzes gegen die neuen, technischen Gefährdungen (Foto, Tonaufnahme), wo die Verletzung eines Vermögensinteresses fehlte. Das allgemeine Persönlichkeitsrecht war ausdrücklich gegen den Liberalismus gerichtet, es war schon eine der typischen Generalklauseln des Monopolkapitalismus. Es hing aber von der jeweiligen Rechtsentwicklung ab, ob, und wie lange das allgemeine Persönlichkeitsrecht als wettbewerbs- oder sozialrechtliches Institut wirkte. Die allgemeine Tendenz war, daß

[23] MALEIN, p. 29—36.; SUHOVERHIJ, op. cit.
[24] VOEVODIN, Op. cit.

in erster Linie die Arbeiterfrage, aber auch der Wettbewerb durch politisch direkt beeinflußbare Sondergesetzgebung geregelt wurden.

Also: der Zusammenhang mit den Vermögensverhältnissen machte die Persönlichkeitsrechte zum Politikum, wie es oben am Beispiel der schweizerischen und ungarischen Entwicklung gezeigt wurde. Aber aus demselben Grunde wurde das allgemeine Persönlichkeitsrecht in das — ausdrücklich eine liberale Wertordnung vertretenden — deutsche BGB *nicht* aufgenommen. Dafür spricht auch, daß die deutschen Persönlichkeitstheorien des 19. Jh. leere Spekulation geblieben sind, bis sie mit sozialen Inhalt erfüllt wurden.[25] Die bislang erörterte Rolle des allgemeinen Persönlichkeitsrechts ist aber zeitgebunden. Nach dem ersten Weltkrieg werden seine antiliberalen Züge sinnlos, umso mehr, da — wie schon gesagt — wichtige Aufgaben durch selbständige Rechtsinstitute abgenommen wurden. Das so entleerte allgemeine Persönlichkeitsrecht wurde von der — im allgemeinen idealistischen — Interpretation der „Persönlichkeit" erobert.[26]

2. Nach dem zweiten Weltkrieg begann eine neue Phase in der Entwicklung der Persönlichkeitsrechte, die in wichtigen Punkten das Gegenteil der früheren ist. Entscheidend ist jetzt die Ausweitung der Persönlichkeitsrechte, die solche Aspekte aufweist, wie die Verallgemeinerung des Persönlichkeitsschutzes (Generalklausel anstatt der besonderen Rechte), die Politisierung, das Unwichtigwerden des Zusammenhanges mit materiellen Verhältnissen usw. Trotz zahlreicher faßbarer Neuigkeiten ergibt sich von der neuen Periode noch kein so definitives Bild, wie von der früheren. Sie kann am besten durch ihre Widersprüche beschrieben werden. (S. Punkt. IV.)

Doch scheint wenigstens die Politisierung und Verallgemeinerung dieser Rechte eindeutig zu sein. Die Politisierung geschieht auf zwei verschiedenen Wegen. Einerseits kann das Persönlichkeitsrecht bei der extensiven Auslegung der traditionellen Grundrechte, bzw. bei der Abgrenzung der staatlichen und der Privatsphäre als prinzipielle Grundlage dienen (dies ist für die Praxis des Obersten Gerichts der USA kennzeichnend). Andererseits aber kann selbst der Grundwert der früheren zivilrechtlichen Persönlichkeitsrechte, die Ehre und Würde (mit der weitesten sozialen Interpretation: das Recht auf ein menschenwürdiges Leben) zum verfassungsmäßigen Grundrecht erhoben werden, als die Unantastbarkeit der menschlichen Würde, oder in positiver Fassung, als ein Recht auf die freie Entfaltung der Persönlichkeit. (Bekanntestes Beispiel ist Art. I. des Grundgesetzes des BRD, s. aber auch die neue schweizerische Verfassung.) Diese zweite Lösung schafft der weitesten Auslegung des zivilrechtlichen allgemeinen Persönlichkeitsrechts eine verfassungsrechtliche Grundlage. (Zugleich wirft sie die Frage der Drittwirkung der Grundrechte auf, auf die wir hier nicht eingehen können.)

[25] Gut ersichtlich aus LEUZE: Die Entwicklung des Persönlichkeitsrechts im 19. Jahrhundert. Bielefeld, 1962.

[26] Neue politische Rolle bekommt das Persönlichkeitsrecht erst im Nationalsozialismus, als Ausdruck und Mittel der integrierten Rechtsstellung des Individuums in der Volksgemeinschaft.

a) (USA) Die zwei Richtungen der Politisierung sind wesentlich unterschiedlich. Die erste beschützt die Person *vor dem Staat*, sie ist die Weiterentwicklung der traditionellen Garantien.

aa) Was hier als offensichtliche Politisierung erscheint, könnte letzten Endes als offentsichtliche Entpolitisierung gedeutet werden. Politisch erhelblich ist z. B. in den USA die Verdrängung der staatlichen Kontrolle aus den inneren Angelegenheiten eines für die Rechte der Schwarzen kämpfenden bürgerrechtlichen Vereins,[27] die Beschränkung des Hausdurchsuchungsrechts bei den auf Bewährung Entlassen,[28] sowie daß die Verfolgung des Lebens und Handels der Bürger „in der Privatsphäre" von Ermittlungs- und Gerichtsorganen mit technischen Mitteln für ungesetzlich erklärt wird, und so erhaltene Beweise nicht verwendet werden dürfen.[29] Und von politischer Relevanz ist die Nichtigkeitserklärung von Verwaltungsakten, die dem Gericht als „unbegründet", „willkürlich" erscheinen, d. h. die Fälle, wo das Gericht die Selbstbestimmung der Person höher wertet als das die Regelung begründende staatliche Interesse. Auf diese Weise wird in erster Linie gegen den behördlichen Druck in alltäglichem Leben, gegen die Beschränkung von „kleineren Freiheiten" Schutz gewährt, — wie gegen die Einmischung in den persönlichen Lebensstil, oder sogar in die Haartracht.[30] (Auch dies kann politisch von Belang sein, z. B. die erfolglosen Klagen von Weißen gegen Schwarze, die in ein bis dahin von Weißen bewohntes Viertel einzogen. Aber der Kampf um die persönliche Geltung in Kleinigkeiten aller Art — die an die „angeborenen Rechte" auf beliebige Kleidung und Nahrung aus dem 18. Jh. erinnern — beeinflußt auch das politische Klima: ob der Staat die Uniformität, die Intoleranz gegen die Abweichenden unterstützt?)

Andererseits kann durch diesen Weg der Politisierung der Persönlichkeitsrechte der Staat von der Entscheidung von lebenswichtigen sozialpolitischen Fragen ausgeschloßen werden — wie z. B. Geburtenkontrolle.[31] Diese (tatsächliche) Entpolitisierung, Reprivatisierung kann man natürlich nur aufgrund der konkreten Situation positiv oder negativ werten.[32]

[27] Für Beispiele s. ASKIN: Police Dossiers and Emerging Principles of First Amendment Adjudication. Stanford Law Quarterly, 1970. p. 196.

[28] Striking Balance Between Privacy and Supervision. Note, New York University Law Review, 1976. p. 800.

[29] Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments. Note, Harvard Law Review, 1977. p. 945.; GROSS: Privacy: Its Legal Protection (revised ed.) Dobbs Ferry, N. Y., 1970.

[30] WILKINSON; WHITE: Constitutional Protection for Personal Lifestyles. Cornell Law Review, 1977. p. 563.

[31] EMERSON: Nine Justices in Search of a Doctrine. Michigan Law Review, 1965. p. 219.; Kommers: Abortion and Constitution. United States and West Germany. The American Journal of Comparative Law, 1977. p. 255, 282.

[32] Der Fall Griswold v. Connecticut (1965) ermöglichte mit dem Schlagwort „individuelle Freiheit" eigentlich die Ausbreitung der von den Mittelschichten schon praktizierten Geburtenkontrolle auf die Armen und Benachteiligten. S. MCKAY: The Right of Privacy: Emanations and Intimations. Michigan Law Review, 1965. p. 259, 282.

bb) In den USA bewahrte man nicht nur die herkömmlichen verfassungsrechtlichen Grundlagen für den Persönlichkeitsschutz, sondern auch die ihnen zugrundelegende liberale Konzeption. Es ist kein Zufall, daß sich diese Art der Politisierung in den USA entwickelte, wo der liberale Mythos noch über starke Bastionen verfügt. Es taucht aber die Frage auf, ob der Persönlichkeitsschutz wirklich auf einer strikten Trennung von Staat und Gesellschaft, auf einem „staatsfreien" Handlungsspielraum für den Bürger beruht und also ein gegen den Staat gerichtetes Freiheitsrecht ist. Ist das Erscheinen eines verfassungsrechtlichen Persönlichkeitsschutzes nicht ein Zeichen dafür, daß das alte liberale System des Schutzes der Autonomie der Person doch nicht hinreichend funktionierte? In der Tat mischte sich der Staat mehr und mehr in die früher als autonom geltenden persönlichen Bereiche ein. So wurde die eindeutige und formale Abgrenzung der staatlichen von der privaten Sphäre überholt. Man mußte neue Grenzen abstecken. Das Persönlichkeitsrecht erwies sich als äußerst geeignet zu dieser Aufgabe. Da die formalen Garantien nicht funktionsfähig durch richterliches Ermessen abgelöst wurden, boten seine Unbestimmtheit und seine Elastizität, andererseits aber sein anerkannter Wertinhalt Möglichkeiten für ein Abtasten der neuen Grenzen der Autonomie.

Der ursprüngliche Eigentümerschutz und der moderne Persönlichkeitsschutz hängen historisch zusammen. Die Frage ist also dieselbe, wie sie vor 100—150 Jahren in Bezug auf das Eigentumsrecht lautete. Konnte *dieses* durch das öffentliche Interesse begrenzt werden? Alle bestimmenden Faktoren der ersten Phase der europäischen Persönlichkeitsrechtsentwicklung, und besonders, daß es um Eigentümerschutz unter ungleichen Kräfteverhältnissen ging, daß man die Garantie der menschenwürdigen Existenz in dem Eigentum sah, sind in der politischen Geschichte des Schutzes der Privatspäre in Amerika ebenfalls vorzufinden. Dem staatlichen Eingriff — selbst in hoheitlichen Funktionen wie die Strafverfolgung — setzte die Unverletzbarkeit des Eigentums Schranken. (Für Hausdurchsuchung und Durchsuchung von persönlichen Sachen war aus diesem Grund eine besondere Ermächtigung notwendig.)

cc) Hieraus ergibt sich die Frage, weshalb zur Anwendung der einschlägigen Verfassungsbestimmungen immer mehr das Persönlichkeitsrecht herangezogen wurde. Die Tatsache, daß gegen die neuen technischen Eingriffsmittel der herkömmliche Eigentumsbegriff nicht mehr verwendbar war, (z. B. gegen die Abhörung ohne „physisches Eindrungen") war nicht der einzige Grund für die Umstellung des Schutzes auf persönlichkeitsrechtliche Grundlage. Die „neue Technik" kann allein schon deswegen keine ausschließliche Ursache der Politisierung sein, da sie die Erfindungen des ausgehenden 19. Jahrhunderts bedeutet, und gegen diese, *unter Privaten*, schon damals für Schutz gesorgt wurde, sowohl in Europa, als auch in den USA.

Außerdem können die technischen Gefahren höchstens teilweise die Politisierung begründen: die Freiheit der individuellen Wahl (Empfängnisverhütung, Lebensstil, was also über die traditionellen Freiheitsrechte hinausgeht), die gleichzeitig

mit dem Schutz vor den technischen Gefahren in den Schutzbereich einbezogen wurde, können sie nicht erklären.

Die Erweiterung des Schutzbereiches der Persönlichkeitsrechte wurde also von der allgemeinen Rechtsentwicklung, insbesondere von der Auflockerung der subjektiven Rechte vorbereitet.[33] Zwar ist es zuzugeben, daß die Früchte für den Persönlichkeitsschutz erst später reif wurden. Die Anerkennung der Berechtigung der staatlichen Intervention ins Wirtschaftsleben trennte in Amerika die persönlichen und die Vermögensrechte voneinander, und während man bei den letzteren den Eingriff mit dem gesellschaftlichen Interesse relativ früh rechtfertigte, blieb es hinsichtlich der persönlichen Güter bei den alten, formellen Garantien.[34] Auch der Zweck der Garantien wurde unterschiedlich aufgefaßt. Sie dienten bei Vermögensrechten der Integration in das öffentliche Interesse — bei persönlichen Rechten hätten sie dagegen die Unabhängigkeit, die Individualisierung zu fördern.[35] Aber nachdem sich die Auffassung allgemein durchsetzte, daß das Maß der staatlichen Intervention dem richterlichen Ermessen unterliegt, erwies sich der Begriff des privacy, der für die Verhältnisse von Privatpersonen schon genutzt wurde, als sehr nützlich für die Unterstützung der Position der Bürger in den die individuelle Freiheit betreffenden Sachen. Das privacy hat auch im Privatrecht keine klaren Konturen, es ist „juristisch unscharf".[36] Auf dem Gebiet des Schutzes der Freiheitsrechte paßt es so sowohl zur Interessenabwägung, als auch zu der Aufgabe, die verschiedensten Sachverhälte auf gemeinsamen Nenner bringend, den Schutz zu verallgemeinern.

Freilich ist die Unbestimmtheit zweischneidig: auch der Schutz wird unsicher, wenn die Garantien gelockert sind. Deswegen hat man die unbedingte Zusicherung eines Minimums des Rechts auf die Privatsphäre, die genaue Definition dieses Rechts für notwendig erklärt.[37]

dd) Es ist noch darauf hinzuweisen, daß dieser Weg der Politisierung den Schutz der Persönlichkeitsrechte verdoppelt. Obwohl die allgemeine Gerichtsbarkeit in Amerika die Unterschiede nicht so scharf hervortreten läßt, wie der Schutz z. B. in Westeuropa nach dem ordentlichen, verwaltungs- und verfassungsrechtlichen Wege zerstückelt würde, — so ist doch die Verschiedenheit des privacy im Deliktsrecht, d. h. als tort, und im Verfassungsrecht augenfällig, natürlich auch was seine praktische Bedeutung anbelangt.

Der Schutz der Persönlichkeitsrechte begann Ende des vorigen Jahrhunderts im tort-Recht, praktisch mit einem den klassischen Rechten entsprechenden Schutzkreis,

[33] Diesem Prozeß, der in der Tat viel komplizierter is, können wir jetzt nicht folgen. Vgl. aber Constitutional Privacy, Harvard Law Review, 1977. p. 964.

[34] COMMONS: Legal Foundations of Capitalism (1924). Clifton, 1974. p. 337, 342. (Z. B. due process bedeutet auf dem Gebiet der Wirtschaft nicht due procedure, sondern due purpose.)

[35] EMERSON, p. 224.

[36] KALVEN: Privacy in Tort Law. Were Warren and Brandeis Wrong? Law and Contemporary Problems, 1966. p. 326.

[37] Constitutional Privacy, Harvard Law Review, 1977, p. 985.

und diesen Charakter hat es trotz der Erweiterung des Schutzes, der Erhöhung seiner Bedeutung und seiner technischen Vereinheitlichung nicht verloren.[38] Es ist neutral geblieben.

Ein richterlicher Schutz der heute als Persönlichkeitsrechte aufgefaßten verfassungsmäßigen Freiheiten gab es natürlich auch im 19. Jh., — auf dem Grund des Eigentumsrechts. Der erste Versuch, die nicht mehr ausreichende eigentumsrechtliche Begründung durch das privacy zu ersetzen, war 1928 unternommen (Olmstead v. U. S.) setzte sich aber erst in den 60-er Jahren durch (Katz v. U. S.). Wie in Europa der Inhalt des allgemeinen Persönlichkeitsrechts nicht genau bestimmt ist, ist in den USA der Inhalt des verfassungsrechtlichen privacy unsicher: es wird für zu viele Zwecke angewandt. Es ist fraglich, ob es nicht zweckmäßiger wäre den Gesetzgeber zu Wort kommen zu lassen.[39] Andererseits ist das Recht auf die Privatspäre, das privacy doch sinngemäß enger, als das allgemeine Persönlichkeitsrecht. Eine Verbindung zur Privatsphäre wird oft durch gekünstelten, ja manchmal grotesken Kunstgriffen geschaffen. (So auch in dem leading case Griswold v. Connecticut, 1965, in dem niedergelegt wurde, daß es das verfassungsmäßige Recht der Ehepartner ist über die Anwendung von Empfängnisverhütungsmitteln zu entscheiden. In der Begründung dieses Rechts dient die häufige Erwähnung des Schlafzimmers nur dazu, zu dem „privacy" eine Brücke zu schlagen.[40] (In der Tat, wenn man nach den gemeinsamen Zügen aller privacy-Fälle, privat- oder verfassungsrechtlich, fragt, so findet man sie nicht in der Privatsphäre, sondern im Schutz der Individualität und der Würde[41] — was also auch Inhalt des (kontinentalen) allgemeinen Persönlichkeitsrechts ist.

b) (BRD.) Der andere Weg der Politisierung ist völlig neu, er verbindet sich auch nicht außerlich mit liberalen Strukturen. Es geht hier also nicht um eine relative Trennung privat- und verfassungsrechtlichen Persönlichkeitsschutzes, auch nicht um gegen den Staat gerichteten Freiheiten. Im Gegenteil: es handelt sich um die relative Verschmelzung von Grundrechten und zivilrechtlichem Persönlichkeitschutz, und um die Drittwirkung der Grundrechte.[42] Diese Entwicklung berührt hauptsächlich das

[38] Die Entwicklung des privacy in der amerikanischen Rechtsprechung und Theorie behandelt der berühmte Aufsatz von PROSSER: Privacy. California Law Review, 1960. p. 383. Neben der Studie von Warren und Brandeis (The Right to Privacy. Harvard Law Review, 1890), die die Karriere des privacy startete, hat die Arbeit von Prosser die Rechtsprechung entscheidend beeinflußt. Prosser faßt die privacy-Sachverhälte in vier allgemeineren Gruppen zusammen: Das Eindringen in die Privatsphäre anderer, die Veröffentlichung vertraulicher Daten, jemanden vor der Öffentlichkeit in falsches Licht stellen, und den Mißbrauch von Namen, Bild usw.

[39] Es begann schon, der Omnibus Crime Control and Safe Streets Act, 1968 tritt im Vergleich zu dem trendmäßig erweiterten privacy zurück, wobei er sich auf die öffentliche Sicherheit beruft.

[40] DIXON: The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy? Michigan Law Review, 1965. S. 197, 214.

[41] BLOUSTEIN: Privacy as an Aspect of Human Dignity: an Answer to Dean Prosser. New York University Law Review, 1964, p. 962, 1005.

[42] RAISER: Grundgesetz und Privatrechtsordnung (1966). In: Die Aufgabe des Privatrechts. Kronberg/Ts., 1977. p. 162.; MÜLLER: Die Grundrechte der Verfassung und der Persönlichkeitsschutz des Privatrechts. Bern, 1964. p. 160.

allgemeine Persönlichkeitsrecht, ist aber auch für einzelne besondere Rechte, wie die Meinungs- und Pressefreiheit usw. wichtig.

Das beste Beispiel dafür ist das Recht der Bundesrepublik Deutschland. An der Spitze des Grundgesetzes stehen die Unantastbarkeit der menschlichen Würde und das Recht auf freie Entfaltung der Persönlichkeit. (Deren Hervorhebung ist, wie auch die weltweite Aufschwung der Persönlichkeitsrechte nach dem zweiten Weltkrieg, eine Demonstration gegen den Faschismus.) Dieses Recht benutzt der BGH schon 1954 um ein zivilrechtliches subjektives Persönlichkeitsrecht zu begründen. Dieses „allgemeine Persönlichkeitsrecht" tritt zu den „besonderen Persönlichkeitsrechten", z. B. Recht auf Ehre, Recht an Briefen und privaten Aufzeichnungen, hinzu. Gleichzeitig gestattete der BGH den Ersatz von nichtmateriellen Schäden für Persönlichkeitsverletzungen.[43] Diese Entwicklung durchbricht also das herkömmliche liberale System des BGB zweifach. Das setzt eine Abkehr von der liberalen Zivilrechts- und auch Verfassungskonzeption voraus. Persönlichkeitsrecht (auch als Grundrecht) bedeutet hier nicht die Abgrenzung der staatlichen und der Privatsphäre. Die Würde des Menschen wird nicht nur vor der politischen, sondern vor aller wirtschaftlicher oder organisatorischer Macht jeder Art geschützt. (Charakteristisch ist, daß man die Drittwirkung des Rechts auf Würde zuerst im Arbeitsrecht anerkannte.[44])

Der verfassung- und der davon untrennbare zivilrechtliche Persönlichkeitsschutz kann schon wegen seiner Allgemeinheit nicht so formell garantiert, werden, wie einst die liberalen Freiheiten: auch andere Grundwerte der Verfassung haben ihre „Drittwirkung", das Gericht kann die eigene Interessenabwägung nicht vermeiden. Andererseits zweifelt man auch in der BRD, ob alle formellen Garantien den freien Ermessen geopfert werden sollen.[45]

Diese Version der Politisierung führte in der Praxis zu einer Befreiung des Persönlichkeitsschutzes im Zivilrecht von technischen Beschränkungen. Ihr politischer Gehalt, von Pressesachen abgesehen, enttäuscht uns jedoch. Die Rechtsprechung haftet zu sehr an den klassischen Rechten. Im deutschen Recht wirkt nämlich eine andere Tradition beschränkend. Eben umgekehrt, wie in den USA, wo die Gerichtsbarkeit zusammenfaßt, die Rechtsgrundlage aber zergliedert, fließen hier die Rechtsgrundlagen zusammen, während die Persönlichkeitssachen vor verschiedene Gerichte gehören. So entziehen dier Verwaltungs- und Arbeitsgerichte die „politischen" Angelegenheiten der Zivilgerichtsbarkeit. Kein Wunder, daß der Theorienstreit um den politischen Inhalt des zivilrechtlichen Persönlichkeitsschutzes zu dem „wirtschaftlichen Zusammenhang" zurückkehrt. In diesem Stellungskrieg wird auf einer Seite behauptet, daß die „freie Entfaltung" auch Eigentums- und Vertragsfreiheit beinhaltet, andererseits aber sagt man, daß das Persönlichkeitsrecht erst dann

[43] BGHZ 13, 344., bzw. BGHZ 26, 349.

[44] Gleichberechtigung von Mann und Frau im Arbeitsvertrag, BAG, Neue Juristische Wochenschrift, 1955. p. 607.

[45] RAISER, p. 184. Anm. 43.

verwendbar ist, wenn diese Institute dem „wirtschaftlich Schwächeren" zu der „Entfaltung" nicht ausreichen. Erinnern wir uns an den politischen Inhalt der ersten Entwicklungsphase der Persönlichkeitsrechte, so können wir sehen, daß ihr aktuelles Politikum nicht darüber hinausgeht; auch dann nicht, wenn die „soziale" Intervention jetzt nicht nur vom Gesetzgeber, sondern auch von den Gerichten erwartet wird.[46]

IV.
Widersprüche des Persönlichkeitsrechts

1. Das Wesen der Persönlichkeitsrechte kann am besten durch Darlegung ihrer immanenten Widersprüche erfaßt werden. Die folgenden Gegensätze durchdringen und wiederholen einander. Sie könnten als eine Fragestellung aufgefaßt werden: was sind die Persönlichkeitsrechte, was sollen sie, und sind sie überhaupt möglich?

a) Massenansprüche, Schutz für den Durchschnitt — individuell, außergewöhnliche Leistung.

Das Rechtsinstitut „Persönlichkeitsrecht" steht im Zeichen der „Autonomie", alle Formulierungen seines Zieles — wie die freie Entfaltung der Persönlichkeit (neuerlich auch in den Motiven der Neufassung des ungarischen ZGB), die Unantastbarkeit des Individuums usw. — besagen dasselbe. Der Aufbau der autonomen Persönlichkeit ist aber eine außerordentliche Leistung. Sie ist höchstpersönlich und kann „von außen her" — und noch weniger rechtlich — nicht gewährleistet und nicht bestimmt werden. Sie ist von den Umständen verhältnismäßig unabhängig, da ihr Maß das Individuum selbst ist. Das Recht verspricht hier etwas, das es nicht geben kann; und das Persönlichkeitsrecht funktioniert natürlich auch nicht in der Weise, als ob es dies sichern wollte. Nur der Ideologie des Persönlichkeitsrechts kommt es zugute, daß in allgemeinen Begriffen viele Interpretationsmöglichkeiten enthalten sind. Der rechtliche Persönlichkeitsschutz kann höchstens die „äußeren" Voraussetzungen einer „menschenwürdigen Existenz" garantieren, wobei „menschenwürdig" nicht näher bestimmt und nur durch die jeweilige öffentliche Meinung umrissen wird. Daher ist es einerseits weniger anspruchsvoll, andererseits entspricht es aber den durchschnittlichen und Massenanforderungen. Dieser Schutz tritt als die Verwirklichung der individuellen, höchstpersönlichen und sicherlich außerordentlichen Autonomie auf.

Dieser Widerspruch folgt nicht aus dem Gegensatz zwischen den Möglichkeiten des Rechts und einer ideellen Zielsetzung, er ist vielmehr Ausdruck des Antagonismus,

[46] Zur Übersicht s. SCHWERDTNER: Das Persönlichkeitsrecht in der deutschen Rechtsordnung. Offene Probleme einer juristischen Entdeckung. Berlin, 1977. p. 125—179.

der *die Stellung des Individuums* in der immer mehr organisierten, *integrierten Gesellschaft* kennzeichnet. Dieses Problem können wir hier nicht erörtern, und auch bei der Besprechung seiner juristischen Aspekte werden wir sehr wesentliche politische Fragen außer Acht lassen. Wir gehen davon aus, daß der Persönlichkeitsschutz dadurch bedeutend wurde, daß die Entwicklung sich objektiv gegen die Autonomie richtete. Im Zeitalter des Liberalismus war der „Selbstschutz der Gesellschaft" gegen die Herrschaft des Marktes notwendigerweise von wirtschaftlichem Charakter, sie wollte der Persönlichkeit wirtschaftliche Garantien geben. Heute ist die Schutzrichtung durch die staatliche Regulierung der Wirtschaft und den Ausbau der sozialen Funktion des Staates verlagert worden: sie ist gegen die übermäßige Regelung gerichtet. Aus diesem Zusammenhang ergibt sich auch die heutige direkte Politisierung des Persönlichkeitsschutzes.

b) Die Expansion der rechtlichen Regulierung — rechtsfreie Privatsphäre

Aus dem „Regulierungskomplex" ergeben sich weitere Fragen für die Persönlichkeitsrechte. Daß die Privatsphäre die zentrale Kategorie des Persönlichkeitsschutzes wurde, ist bezeichnend: sie zeigt die Richtung der Gefahr. Die verschiedenen Auffassungen über die Privatsphäre sind darin einig, daß sie unter Privatsphäre das (physische und spirituelle) Gebiet verstehen, das vom Individuum kontrolliert wird, also von äußerer Steuerung frei ist. Es geht hier um den Schutz gegen die staatliche Einflußnahme; um eine Abgrenzung der Kompetenzen aufgrund der Begründetheit des Eingriffs und der rechtlichen Regelung. *Die Notwendigkeit der Regulierung* und der *Schutz* gegen die Regulierung *fallen zusammen*, die Regulierung verschlingt alles, während sie Schutz gegen sich selbst gibt. Die Regulierung ist nicht Ursache, nur Symptom der „Eingriffe", die durch den Integrationsprozeß bestimmt sind. Und diese Eingriffe stammen nur zum Teil vom Staat. Andererseits vermehren sich die das Individuum unmittelbar berührenden Tatbestände, die, durch die technische Entwicklung ermöglicht, sofort praktiziert werden — Organtransplantation, neue Methoden der Geburtenkontrolle, die Datenspeicherung —; und daher in die Ordnung der Gesellschaft eingebaut, d. h. geregelt werden müssen.

Der Persönlichkeitsrechtsschutz tritt also heute für die Freiheit von der Regelung auf, diese Forderung ist aber nicht mehr zeitgemäß. Der Schutz der Persönlichkeitsrechte betont eigentlich *die Garantien der Regelung*, dies ist seine aktuelle Aufgabe. Im Falle neuer Tatbestände (Organtransplantation, medizinische Versuche) bzw. bei nicht-staatlichen Eingriffen im allgemeinen (Datenbanken oder die Anwendung psychologischer Tests am Arbeitsplatz) sind es unter Anderen die Persönlichkeitsrechte, die die Regelung verwirklichen. Auf schon geregelten Gebieten wird die Begründetheit der Regelung mit dem Mittel des Persönlichkeitsrechts überprüft: so wird die Frage des begründeten Eingriffs vor einem anderen Forum, dem Gericht, und in einem anderen, d. h. öffentlichen Verfahren kontrolliert. Vergessen wir nicht: der Drang nach der Eliminierung des Rechts, nach dem Autonomieschutz

bringt das Recht in die Intimsphäre hinein bis zum Grenzfall der Regulierbarkeit, zur Frage des Lebens und des Todes. Schon mit einer einmaligen richterlichen Schutzgewährung wird das verwirklicht.

c) Selbstgarantie — organisatorische oder Regelungsgarantie

Es gibt nämlich keine andere Schutzmöglichkeit. Die Chancen des Selbstschutzes sind zusammengeschrumpft, der Mensch ist auf die „äußerliche" Sicherung seiner Persönlichkeitsrechte angewiesen. Auch deshalb geriet dieses Gebiet unter die Herrschaft des Rechts.

Die „klassischen" Persönlichkeitsrechte setzten ursprünglich solche Verhältnisse voraus, in denen die Parteien einander von Angesicht zu Angesicht gegenüberstanden; sie entsprangen der Schattenseite einer noch persönlichen Welt, der Kehrseite der Idylle: Klatsch, Beleidigung, gefallene Mädchen, verlassene Bräute. Die nicht-rechtlichen Regeln sind hier wichtiger als die rechtlichen: die Moral, Sitte und Brauch, die innere Ordnung und Sanktionen einer Familie, Gemeinde, Kleinstadt kommen hier zur Geltung. Der Beleidiger und der Verletzte kommen oft aus den gleichen oder nahestehenden gesellschaftlichen Kreisen, ihre Kräfte sind nicht unproportionell verschieden, und es gibt die Möglichkeit einer außerrechtlichen Genugtuung. Bis zum Beginn unseres Jahrhunderts war auch die Struktur der Öffentlichkeit anderes (eben in ungarischen Kleinstädten gab es z. B. mehrere örtliche Presseorgane.) Die liberalen Ideen unterstützten den Selbstschutz; „die Garantie des Vermögens, aber wenigstens des Talents, der Vortrefflichkeit ist in jedermann vorhanden". (So können wir den duellierenden Bürger des 19. Jahrhunderts nicht eindeutig für lächerlich halten.) Das Recht kam hier nur ergänzend zu Wort, es zivilisierte die Rache, gab der Genugtuung besonderen Nachdruck, glich eventuell den Unterschied zwischen den ungleichen Kräftepositionen der Partner aus. (In den Privatklage-Sachen, die die Atmosphäre dieser Welt bewahren, ist es heute noch so.)

Letzten Endes hat man dieses Modell weitergeführt, als der Schutzkreis des Persönlichkeitsrechts rasch erweitert wurde. Wie schon mehrmals erwähnt, hatte man diesen modernen Persönlichkeitsschutz anfangs ausdrücklich zur Reparation der erschütterten Garantierolle des Eigentums, oder zum deren Ersatz verwendet. Unter solchen Umständen ist der Schutz des Persönlichkeitsrechts mit der Ideologie der Autonomie noch nicht in Widerspruch geraten.

Seit dem Aufschwung der Persönlichkeitsrechte nach den zweiten Weltkrieg wird aber der Selbstschutz aus zweierlei Gründen erschwert. Einerseits schwindet das Medium des außerrechtlichen Schutzes dahin; die Gemeinschaften, die nicht rechtlich zusammengehalten werden, lösen sich auf, und die nichtrechtlichen Normensysteme verlieren an Kraft. Andererseits, und das ist die wichtigere Ursache, verändert sich der Charakter der Eingriffe, denen die Person ausgesetzt ist. An Stelle der persönlichen Beleidigung tritt eine *unpersönliche*, oft *technische* Gefährdung, die schon deshalb das Kräftegleichgewicht der Parteien zerstört, und das umso mehr, als sie regelmäßig — im

Verhältnis zur Einzelperson — aus Übermacht, im allgemeinen aus einer Organisation hervorgeht. Die Gefahr ist also auch in diesem Sinne unpersönlich. (Die Beispiele gelten schon als Gemeinplätze: Abhörungs- und andere Überwachungsgeräte, elektronische Datenverarbeitung und das mit deren Hilfe hergestellte Persönlichkeitsbild, im Gegensatz zur einstigen unabhängigen lokalen Presse die konzentrierten Massenmedien in der Hand des Staates oder von Großorganisationen.) Weiterhin wird, wie gesagt, die Persönlichkeit häufig durch die Unbegründetheit einer Regelung verletzt. Gegen all diese sind die überkommenen Selbstgarantien irrelevant, sie waren in einem anderen System wirksam. Wir müssen auch beachten, daß die „klassischen" Verletzungen vielmals eindeutiger als Verletzungen qualifiziert werden konnten, als die heutigen, weil ihr Deliktscharakter offensichtlich war. Jetzt verrelativiert sich das „Böse", das Übel in den vielfältigen Zusammenhängen, und der Aspekt wird vorrangig, bis zu welcher Grenze die Person im Widerstreit der Interessen die Eingriffe dulden muß.

Wie die Gefahr ist, so ist auch die Abwehr. Die Tatsache aber, daß an die Stelle des Selbstschutzes der Schutz der Persönlichkeit etwa als „staatliche Leistung" tritt, kann höchstens in der Ideologie mit dem Programm der Freiheit vom Staat, der „Autonomie" übereinstimmen.

Dieser aktuelle „organisatorische" Schutz wirft neue Fragen auf — die dort wo das Recht „die Schwächeren" schützt, im allgemeinen vorzufinden sind. Ein solches Problem ist. z. B. die Alternative des zivilgerichtlichen Weges oder der verwaltungsrechtlichen Regelung, die im Falle massenhafter und typischer Verletzungen schon in der Vergangenheit zu entscheiden war (siehe Arbeitsunfälle), und heute z. B. auf dem Gebiet des Datenschutzes oder der Medikamentenversuche besonders aktuell ist. Der gerichtliche Schutz setzt eine individuelle Klage voraus. Dadurch, und auch wegen der individueller Wirkung des Urteils ist eine Rückkoppelung zum Selbstschutz festzustellen. Hauptproblem dieses Gerichtsweges ist heute die Passivität der Verletzten. (Die Empfindlichkeit der Menschen gegenüber den Persönlichkeitsverletzungen zu erwecken und sie zur Klage anzuspornen, heißt sie demokratisieren.) Der Gefahr entsprechend könnte man die Organisierung der Betroffenen versuchen. Eine Bürgerklage ist auch in der höchstpersönlichen Sachen der Persönlichkeitsrechtsverletzung denkbar (wenn z. B. es um die Erzwingung einer normativen Regelung, oder um die Anfechtung von Verwaltungsbeschluß geht: wie Einsichtrecht in die Daten, Berichtigungsrecht). Der Selbstschutz ist also nicht einmal in der Klageerhebung ausschließlich. Und zum Schluß: die unbestreitbare Priorität des organisatorischen Schutzes schließt die Anwendbarkeit von materiellen Garantien nicht unbedingt aus.[47]

[47] S. z. B. REICH: The New Property. In: Schwartz; Skolnick (red.): Society and the Legal Order. New York/London, 1970. p. 595.

d) „Normative Rechtsprechung", allgemeine Verhaltensnormen — individualisierter, billiger Schutz

Die Ideologie der Autonomie ist natürlich in zahlreichen Eigenschaften des Persönlichtkeitsrechts ausreichend begründet. Die Interpretation liegt auf der Hand, daß der zivilrechtliche Schutz des Menschen durch den Persönlichkeitsrechtsschutz von der „abstrakten Person" auf die konkrete Person verlagert wird. An die Stelle des Eigentümerschutzes (oder daneben) tritt der Schutz des Menschen unabhängig von der Eigentümerqualität. Ein Aspekt desselben Prozesses ist es auch, daß die Qualifizierung des allgemeinen Persönlichkeitsrechts als subjektives Recht, sogar deren Möglichkeit bestritten ist. Das subjektive Recht verwirklicht in seiner Eindeutigkeit, und so in seiner Rationalität, die Idee der Selbstregulierung, und macht deshalb das richterliche Ermessen überflüssig — es sind also Ideen des klassischen Zivilrechts, und deshalb können wir im 19. Jahrhundert von der Herrschaft des materiellen Rechts sprechen. Nach dem Liberalismus kehrt sich aber alles um. Das System der subjektiven Rechte lockert sich auf, die richterliche Ermessenfreiheit dehnt sich aus. Das formelle Recht (d. h. das Verfahrensrecht) gewinnt an Bedeutung: die vom subjektiven Recht unabhängige „Klagbarkeit" rückt in erster Linie in den „Schutzaufgaben" des Zivilrechts (der Zivilgerichte) in den Vordergrund.[48] Die mit der Billigkeit erscheinende Individualisierung wurde im Persönlichkeitsrechtschutz noch durch den individuellen Charakter dieser Verhältnisse verstärkt. Hier hat die Individualisierung und Konkretisierung in der Tat kein Ende: es hängt selbst vom subjektiven Urteil ab, ob die Persönlichkeit überhaupt verletzt wurde. Auch rechtstechnisch scheint eine sehr individualisierte Interessenabwägung geboten: weder die Ehre, noch der gute Ruf, und noch weniger das allgemeine Persönlichkeitsrecht geben dem Ermessen ein greifbares Maß; der Richter kann nur aufgrund aller Umständen des Einzelfalles Entscheidung treffen. Demnach ist das Maß der Persönlichkeitsrechte die Person selbst.

Aber der Schein trügt. Wie der Persönlichkeitsschutz durch den Antiindividualismus gefördert wurde, wie dieses Selbstbestimmung und Unabhängigkeit versprechende Institut durch Erstreckung des staatlichen Eingriffes hochgewachsen wird, so ist auch die Privatsphäre keine Privatsache. Dies wäre hinsichtlich der gesellschaftlichen Funktion der Persönlichkeitsrechte ebenso undenkbar, wie technisch. Die *rechtlichen* Grenzen des Eingriffes, der Regulierung und der Lenkung (d. h. von der anderen Seite, die der Selbstkontrolle) können und sollen nur *allgemein* bestimmt werden, diese Grenzen können ausschließlich so garantiert werden. Auch im zivilrechtlichen Persönlichkeitsschutz geht es nämlich um die Festlegung der Rechtsstellung des Bürgers (ebenso wie früher mittels der abstrahierten Eigentümerstellung bzw. deren Möglichkeit, der Rechtsfähigkeit); aber heute schon in

[48] So die Bürgerklage oder die class action im Umwelt- und Verbraucherschutz. Für Ungarn s. SÓLYOM, L.: Der zivilrechtliche Umweltschutz und die Möglichkeit einer Bürgerklage im ungarischen Recht. Acta Juridica, Acad. Sci. Hung. 1980, p. 19.

einem Zivilrecht, dessen „Autonom-Struktur" weit über die Vermögensverhältnisse hinausreicht.

Die Verallgemeinerung und die Standardisierung sind andererseits auch technisch notwendig: im Rahmen des allgemeinen Persönlichkeitsrechts *schafft* der Richter *Recht*. Anders ausgedrückt, die Eigentümlichkeit der Generalklausel des allgemeinen Persönlichkeitsrechts (oder des privacy) spricht gegen die Individualisierung. Diese Generalklausel ermächtigte den Richter „besondere" Persönlichkeitsrechte zu konstituieren. Daher erklärt sie alle Werte, die der Entwicklung und der Autonomie der Persönlichkeit anhaften, grundsätzlich für gleichrangig mit allen hier geltend gemachten Gegeninteressen; — darüber hinaus enthält sie aber keinen konkreten Gesichtspunkt für die richterliche Interessenabwägung. Selbst die deliktische Generalklausel bietet mehr Anhalt, wo das Vorhandensein eines „Schadens" im allgemeinen die Rechtswidrigkeit begründet. Beim Persönlichkeitsrecht wird der Richter oft ein subjektives Recht deklarieren, soweit er eine Verletzungshandlung als rechtswidrig qualifiziert, d. h. die Persönlichkeitsrechtsverletzung feststellt, oder aber die Anwendbarkeit des allgemeinen Persönlichkeitsrechts beschließt. Bei der persönlichkeitsrechtlichen Generalklausel hilft auch das Verschulden wenig. Es ist aus geschichtlichen Gründen nicht in allen Rechtsordnungen Voraussetzung der Verantwortlichkeit, und wenn ja, auch dann bereitet es Schwierigkeiten. Das Verschulden und Rechtswidrigkeit sind hier besonders schwer abgrenzbar. Der für die Verteilung von Vermögensrisiko ausgestaltete standardisierte Fahrlässigkeitsmaßstab paßt nicht zu den hier überwiegenden moralischen Elementen und Nichtvermögensschäden. Überhaupt müßte zuerst entschieden werden, ob die Verletzungshandlungen hier zweckmäßigerweise unter dem subjektiven Begriff des Verschuldens vereinigt werden sollten, oder der Schutz auf objektiven Interessenabwägung gegründet werden soll. Unter solchen Umständen ist es also verständlich, daß der Persönlichkeitsrechtsschutz von der uralten (und primitiven) Technik der Verallgemeinerung beherrscht wird: von der Versteifung und Entpersönlichung konkreter Tatbestände, d. h. von der Anerkennung neuer und neuer besonderer Persönlichkeitsrechte. Die Feststellung des Tatbestandes ersetzt die Anwendung der „Rechtswidrigkeit", der „Rechtsfertigungsgründe", sogar des „Verschuldens", man arbeitet hier mit der Abgrenzung, mit der Definition eines neuen Rechts.

All das kann anhand eines bekannten Beispiels erläutert werden. Das Recht am eigenen Bild — wenn das Bild von der Massenmedien verwendet wurde — wird gegenüber der Freiheit der Information abgewägt. Für den Fall, daß dieses letztere Interesse sich als das stärkere erweist, wendet man nicht die Konstruktion des absoluten Schutzes des Rechts am eigenen Bild und die Geltendmachung eines Rechtsfertigungsgrundes an, sondern dieses Recht selbst wird so ausgebaut, daß es sich auf „öffentliche Auftritte" oder auf „Personen der Zeitgeschichte" schon von vornherein nicht erstreckt. Es gehört auch zur Methode der Verallgemeinerung, der Konstituierung eines Persönlichkeitsrechts, daß das Gericht die Kriterien des

öffentlichen Auftrittes oder der Qualifizierung als Person der Zeitgeschichte aufgrund objektiver Interessenabwägung, also im allgemeinen, und nicht im Hinblick auf die individuelle Empfindlichkeit des Klägers festlegt. (In der Rechtsprechung steht fest, wo die Grenzen der „Öffentlichkeit" sind, oder wie lange es dauert bis der „öffentliche" Charakter erlischt.)

Wenn demnach jemand vom Durchschnitte abweicht, d. h. „autonom" handelt, verliert er sein Recht auf „Autonomie". Die technischen Fragen zeigen also auch, daß das Persönlichkeitsrecht dem Durchschnitt dient.

Zum Schluß weisen wir noch darauf hin, daß nicht nur die Generalklausel, sondern auch die engeren Tatbestände häufig auf objektiven Kriterien aufgebaut sind. (In den USA ist z. B. die Veröffentlichung von persönlichen Daten einer der grundlegenden privacy-Tatbestände. Entscheidend ist immer die „Veröffentlichung"; der Schutz wird durch die die Veröffentlichung erlaubenden Privilegien umgrenzt, und nicht durch die Intimität der Data.)

Es ist erst der erste Schritt zum Schutz, eine grobe Abgrenzung der besonderen Persönlichkeitsrechte, was auf diese Weise geschieht; die so gegebenen objektiven Grenzen sind weit genug um weiteren Abwägungen Raum zu geben. Aber die Gerichte geben auch hier keinen wirklich individualisierten Schutz, sie bemühen sich vielmehr um die Entwicklung allgemeiner Standarde. Prüften wir die Persönlichkeitsrechte aus der besonderen Sicht der Haftung her, könnten wir sehen, daß hier nicht nur Rechtswidrigkeit und Verschulden, sondern auch noch Schaden voneinander nicht trennbar sind, und daß sie einander gegenseitig definieren. (Um den Schutz zu genießen, soll der Verletzte „normal" empfindlich sein.) Die Grenze des Persönlichkeitsrechts ist also im allgemeinen die Vernünftigkeit. Auch das richterliche Ermessen ist nicht völlig individualisiert. Es strebt notwendigerweise danach Standarde zu bilden oder anzuwenden.[49] Wir haben den Eindruck, daß das Institut des Persönlichkeitsrechtsschutzes, während es den rechtlichen Schutz auf früher von dem Selbstschutz beherrschte Gebiete ausdehnt, diesen Lebensverhältnissen quasi ein „Gesetz geben" will — an Stelle der obsoleten gesellschaftlichen Normen, oder den existierenden entgegen. Dieser Prozeß ist technisch noch widerspruchsvoll und ungelöst.[50]

[49] KALVEN macht es lächerlich, daß im verfassungsrechtlichen Persönlichkeitsschutz der USA innerhalb von 20 Jahren mehr Regeln aufgestellt wurden, als während 200 Jahren im Deliktsrecht. (The Reasonable Man and the First Amendment. The Supreme Court Review, 1967. p. 267, 299.) Diese Normsetzung, Standardisierung ist aber natürlich. Für das sowjetische Recht s. Флейшиц; Йоффе (red.): Комментарий к ГК РСФСР. Moskwa, 1970., zum § 7., wo betont wird, daß es nicht vom subjektiven Empfinden des Verletzten abhängt, ob ein Persönlichkeitsrecht verletzt wurde, oder nicht. Darüber entscheidet das Gericht, „aufgrund der Moral der den Kommunismus aufbauenden Gesellschaft und der Regel des sozialistischen Zusammenlebens, unter Beachtung des kulturellen Niveaus und des Bewußtseins des Verletzten".

[50] Die abstrakte Kasuistik der Ausbauperiode der Persönlichkeitsrechte entsprach den garantiellen Aufgaben. Doch ist es schon heute zu fragen, wie man (etwa als Ersatz für den dogmatisch festen „Schadens"-begriff) das Minimum des Schutzes dogmatisch formulieren könnte, und zwar umso mehr, da

e) Die Konstruktion ähnlicher Gegensatz-Paare könnte fast unbegrenzt fortgeführt werden. Dadurch aber würden wir einerseits nur die Überdeckungen vermehren, und andererseits würden wir dieselben Probleme immer nur aus ein wenig veränderter Sicht, immer nur ein wenig anders beleuchtet sehen. Mit Recht können wir also fragen, ob nicht derselbe Widerspruch variiert wird, und ob anstatt der Vermehrung, diese Widersprüche nicht auf einen wesentlichen Widerspruch reduziert werden könnten. U. E. lohnt es sich nicht.

Das Grundproblem des Persönlichkeitsrechts ist nämlich selbst von sehr allgemeiner Natur. Es handelt sich um grundlegende Lösungen des Verhältnisses zwischen Individuum and Gesellschaft, Gesellschaft und Staat, bzw. Staat und Individuum, wobei für die Persönlichkeitsrechte nur das charakteristisch ist, daß sie diese Verhältnisse sehr unmittelbar ausdrücken. Daraus ergibt sich einerseits, daß das Persönlichkeitsrecht sehr eng und empfindlich mit der jeweiligen geschichtlichen Situation verbunden ist, und deshalb sein konkreter Inhalt und seine Funktion sehr veränderlich sind. Weiterhin, da es nicht allein die erwähnten grundlegenden Verhältnisse rechtlich erfaßt, sind sein Verhältnis zu den anderen grundlegenden Rechtsinstituten, sowie seine Wichtigkeit auch geschichtlich bedingt variabel. (Z. B. sein Verhältnis zu den Grundrechten der Verfassung oder zum Eigentumsrecht.) Gleichzeitig aber — ebenfalls historisch eng determiniert — scheinen die Ideologie des Persönlichkeitsrechts, und sein Wertinhalt beständig zu sein. Die Persönlichkeitsrechte können also immer unter dem Gesichtspunkt des Verhältnisses zwischen individueller Freiheit und Autonomie sowie der Macht analysiert werden. Diese Analyse würde sicherlich zur Klärung der rechtlichen Natur der Persönlichkeitsrechte beitragen. An dieser Stelle behandeln wir nicht diese allgemeinen Probleme, sondern die Widersprüche, die für das Persönlichkeitsrecht als Rechtsinstitut spezifisch sind. Deshalb setzen wir die Reihe der Widersprüche fort — diesmal aber ohne detaillierte Erörterung. Durch diese Beispiele wollen wir die *Funktionsweise* des Persönlichkeitsrechts *im allgemeinen* beschreiben. Wir systematisieren die verschiedenen Aspekte indem wir die Gegensätze gemäß den heute wichtigsten Typen der Persönlichkeitsrechte einordnen: nach dem „politischen" und dem „neutralen" Persönlichkeitsrecht. Die einzelnen Persönlichkeitsrechte können natürlich nicht als ausschließlich „politisch" oder „neutral" gewertet werden; beide Seiten des Widerspruchs sind ja in jedem enthalten, auch wenn deren eine vorherrscht. Es geht also genauer gesagt um zwei möglichen Anwendungsarten, um zwei Funktionen eines beliebigen Persönlichkeitsrechts. Trotzdem wählen wir bei der Aufstellung der folgenden Tabelle die für die einzelnen Seiten repräsentativen Rechte als Beispiel.

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die Schutzansprüche die festen Tatbestände häufig sprengen. (So wurde z. B. die strikt definierte defamation im amerikanischen common law von dem privacy durchgebrochen. Das Kriterium der reasonableness löst andererseits die Garantien auf, und verbindet den Schutz zu eng mit der konkreten gesellschaftlichen Situation.)

Beispiele: Das allgemeine Persönlichkeitsrecht und die sich davon abtrennenden neuen Rechte	die „klassischen", bzw. allgemein akzeptierten einzelnen besonderen Persönlichkeitsrechte
„politisch"	„neutral"
Grundlage der gesellschaftlichen Aktivität („Rechtsstellung", „Partizipationsrecht")	Abgrenzung und Schutz der Privatsphäre
positives Handeln	Passivität, Aufrechterhaltung des gegebenen Status
„Entfaltung"	Verinnerlichung, Ausschluß der Außenwelt
alltägliche Aktivität	außerordentliche Gefährdung, äußerer Angriff
individuell, nach „Autonomie" strebend	die Stellung im Kollektiv sichernd
subjektiv (Selbstbestimmung)	objektiv (gesellschaftliche oder Rechtsnormen)
das Gegebene gestaltend, umformend	in das Gegebene integrierend, das verstärkend
kreativ, kritisch	der bestehenden Ordnung entsprechend die Gerechtigkeit verwirklichend
unsicherer Schutz	sicherer Schutz
„Neugebiete" der rechtlichen Regelung, Grenzfälle	gewöhnliche, alltägliche Tatbestände
Die Lösung des individuellen Konflikts ist zugleich auch eine neue Kompetenzverteilung, „Normgebung"	Der individuelle Konflikt wird im beständigen, kollektiven Rahmen geschlichtet, dieser Rahmen wird dadurch verstärkt
In der Entscheidung sind die konkreten Tatsachen und die jeweilige Rechtspolitik maßgebend	Die Entscheidung enthält viele formelle Elemente
subjektives Recht, Übergang zu den Freiheitsrechten und den reinen politischen Kategorien	subjektives Recht, Übergang zu reiner sanktionierender Rolle des Zivilrechts aufgrund inhaltgebender anderer Rechtsnormen („schützt nur")

Nach der Tabelle wiederholen wir sofort, daß wir darin die Widersprüche aufgezeigt haben, die zum Wesen der Persönlichkeitsrechte gehören, also für ein jedes Persönlichkeitsrecht gelten, und daß diese Widersprüche nicht erstarrt sind. Gegebenenfalls kann auch ein „klassisches" Persönlichkeitsrecht „politisch" funktionieren, und umgekehrt. Diese Widersprüche lassen sich sehr leicht ineinander uminterpretieren; „Privatsphäre" und „Gesellschaft", „Autonomie" und Integration" sind eigentlich voneinander nicht trennbar. Das gilt für alle, oben erörterten charakteristischen Widersprüche, wie individuelle Selbstverwirklichung — durchschnittlicher Schutz, Freiheit von der Regulierung — rechtlicher Schutz usw. Es ist z. B. offensichtlich, daß der für Anerkennung seines Rechts auf individuellen Lebensstil Auftretende seine innere und äußere Unabhängigkeit betont, und seinen eigenen Weg geht. Gleichzeitig drückt er aber schon dadurch, daß er rechtlichen Schutz begehrt, seine Bereitschaft zur Integration aus, und tut den ersten Schritt dafür, daß sein momentan in Augen der Mehrheit noch deviant geltendes Verhalten allgemein anerkannt und zum Bestandteil der herrschenden Ordnung werde. Es ist daher kein Zufall, wenn solche Begriffe wie Regulierung und Selbstbestimmung, oder Grenzfall und Alltäglichkeit auf beiden Seiten der Tabelle vorzufinden sind. (Zur Erklärung des letzteren denken wir z. B. daran, daß die erwähnte „Devianz" gesellschaftlich sicherlich einen Grenzfall darstellt, wird aber als Persönlichkeitsrecht anerkannt, so wird es Grundlage des tagtäglichen Lebens der Person. — Eine Ehrverletzung bringt das Individuum durch die Erschütterung seines Status in Grenzsituation, solche Fälle sind aber gesellschaftlich alltäglich, und mit dem Schutzmechanismus zusammen rutinmäßig.)

Diese Relativität macht aber die Unterscheidung der Funktionsweisen des Persönlichkeitsrechts nicht sinnlos. Im Gegenteil: es sind eben die Relativität der Unterscheidung, und ihre Grundlage, die ununterbrochene „Aufhebung" des Individuellen und des Autonomen in der Gesellschaft, die das Wesen des Persönlichkeitsrechts am bildhaftesten ausdrücken. Die „politische" Funktionsweise ist die Avantgarde. Sie strebt der Sicherung der Selbstverwirklichung, der Autonomie nach — obwohl diese mittels des Rechts, das dazu einfach ungeeignet ist, nie erreichbar sind. Dennoch kann man die praktische Leistung Persönlichkeitsrechte und ihre Möglichkeiten nicht hoch genug einschätzen. Zwischen den Extremen der „moralischen Genialität", die zur Verwirklichung der Autonomie notwendig wäre und des restlos in die Gesellschaft bzw. den Staat integrierten Individuums bedeutet das Persönlichkeitsrecht die Vermittlung. Es gewährt einen erträglichen Spielraum: „das Recht an der Nuance", wie der ungarische Dichter Gyula Illyés sagt. Das bedeutet ein Recht auf das Versuchen, das Suchen des eigenen Weges, auf die Anerkennung der Alternative, des „Gesetzes des Morgens". Sogar in einem versteiften „klassischen" Persönlichkeitsrecht können wir das Prinzip der Individualisierung entdecken; auch es bewahrt vor der völligen Einschmelzung in die Gesellschaft.

Solange wir die Natur und das Funktionieren des Persönlichkeitsrechts so *abstrakt* untersuchen, kann die Betonung und die positive Bewertung der erwähnten Vermittlerrolle als willkürlich erscheinen. Theoretisch könnten wir auch die andere

Seite hervorheben. Demnach wäre das politische Persönlichkeitsrecht gar keine Avantgarde, es diente im Gegenteil dazu, der politischen oder andersartigen Avantgarde eine Falle zu stellen, diese zurückzuhalten. Es verspräche nicht Autonomie, sondern die Verminderung und Milderung der Konflikte.[51] Welche Verinnerlichung der „äußeren Macht", welche Identifikation mit der Rechtsordnung ist notwendig um hinzunehmen, daß die Grenzen durch das Persönlichkeitsrecht gezogen werden, die das Individuum nicht mehr zu den Hobbes'schen „inneren Vorbehalten" zwingen!

Die Dialektik der Persönlichkeitsrechte entartet offensichtlich unvermeidlich zu Sophistik — wenn wir nämlich die Widersprüche nicht in ihrer Einheit auffassen; wenn wir in den völlig abstrakt entworfenen Mechanismus heimlich — gleichfalls abstrakte — Werte hineinbringen (die Abschätzung des Kompromisses, oder das Lob der Vermittlung); wenn wir trotz der Erkennung der Natur der Persönlichkeitsrechte diesen entgegengesetzen Forderungen stellen, wenn wir vom Persönlichkeitsrecht etwas verlangen, wozu das Recht nicht fähig ist. Die prinzipielle Klärung der Wesenszüge des Persönlichkeitsrechts war die Voraussetzung seiner praktischen Handhabung. Aber jede weitere Wertung ist nur in gesellschaftlichem Kontext sinnvoll. Der gesellschaftliche Hintergrund der Persönlichkeitsrechte ist heute, zur Zeit ihrer weltweiten Verbreitung, ziemlich heterogen — besonders wenn wir es mit dem einheitlichen Gesellschaftsbild, Menschenbild und Wertordnung vergleichen, die dieses Recht jahrhundertelang begleiteten. Jedenfalls stehen ihre „politische" Deutung und Praxis in Einklang mit der jüngsten Geschichte, und mit den Ursachen der Blüte der heutigen Persönlichkeitsrechte.

2. Diese empirische Mündung unserer theoretischer Untersuchung ist notwendig, sie ist sogar selbst ein theoretisches Ergebnis. Es stimmt mit den Resultaten unserer historischer Studien überein. Das Persönlichkeitsrecht darf nicht nur von der konkreten geschichtlichen Situation nicht abstrahiert werden, sondern auch nicht von der vorausgesetzten Wertordnung (Gesellschaft- und Menschenbild). Diese Feststellung wäre Gemeinplatz wenn wir nicht hinzufügten, daß die heutige Unsicherheit und Widersprüchlichkeit der Persönlichkeitsrechte mit der Unklarheit dieser Grundlagen zusammenhängen. Unsere allgemeine Untersuchung müßte demnach mit der Prüfung der Persönlichkeitsrechte in den einzelnen Rechtsordnungen, unter Berücksichtigung des gesellschaftlichen Hintergrundes und der herrschenden Ideologien fortgesetzt werden. Dies ginge natürlich über den Rahmen dieser Studie weit hinaus. Wir schließen die vorliegende Arbeit mit der Hervorhebung eines sehr wichtigen Gesichtspunktes: die Persönlichkeitsrechte müssen in die totale Entwicklung des Zivilrechts eingefügt werden.

a) Wir sahen, daß die isolierte Untersuchung der Persönlichkeitsrechte nicht zweckmäßig ist, und daß der Zusammenhang dieser Rechte mit dem Zivilrecht auch

[51] Aufschlußreich ist in dieser Beziehung die Konzeption von LUHMANN über die Gewissensfreiheit. Er schlägt vor, unter Gewissensfreiheit anstelle liberaler Phrasen das zu verstehen, daß der Staat seinen Bürgern keine zu Gewissenskonflikt führenden Entscheidungen auferlegt. Die Gewissensfreiheit und das Gewissen. Archiv des öffentlichen Rechts, 1965. p. 257.

nicht auf systematische Probleme reduziert werden kann. Es bringt vielmehr Ergebnis, wenn die Persönlichkeitsrechte als Teil der Wandlungen des Zivilrechts gesehen werden. Die heutige Wichtigkeit der Persönlichkeitsrechte ist z. B. Symptom der neueren Zivilrechtsentwicklung, und auch umgekehrt: die Eigenheiten der Entfaltung des Persönlichkeitsschutzes beleuchten und interpretieren die Tendenzen im Zivilrecht. Als Beispiel nennen wir die ständig ausgeprägter werdende Schutzfunktion des Zivilrechts, die sich in den Persönlichkeitsrechten, im Verbraucher- und im Umweltschutz realisiert. Diese alle zeichnen sich durch eine „Allgemeinheit" aus. Die Bedeutung der Sache kann über die Interessensphäre der Parteien hinausgehen. Ihre Schutzwirkung umfaßt auch Andere. Die Inanspruchnahme des Schutzes kann von der Verletzung eines subjektiven Rechtes unabhängig werden. Die Rolle des Richters im Vergleich zu den nur die Parteien berührenden Rechtsstreiten verändert sich. Die organisierende, allgemein normsetzende, sogar rechtssetzende Funktion des Richters wird betont, da er in solchen Fällen immer grundsätzlichen Interessen und Werte konkretisiert bzw. abwägt, und zwar hinsichtlich beider Parteien. (So muß er z. B. das Interesse der Produktion gegenüber dem der Umwelt abwägen. In Persönlichkeitsrechtsachen können sich beide Parteien auf die Grundrechte der Verfassung berufen.) Die Interessenabwägung ist häufig unmittelbar politischer Natur, aber mittelbar ist sie immer. In dieser Perspektive ist die Entwicklung des materiellen und des Prozeßrechts zusammen zu betrachten.

Die Wandlungen sind besonders aufschlußreich hinsichtlich der Weiterentwicklung der zivilrechtlichen Verantwortlichkeit. Durch ihre Klärung können wir Gesichtspunkte gewinnen um zu sehen welcher Schritt auf die Entfaltung der schon gut bekannten Entwicklungstendenzen (wie die Objektivierung der Haftungsgrundlage, die durch Einschaltung von Schadensverteilungsmechanismen ausgebauten Systeme der Schadensregulierung) folgen soll. Statt des Schadenersatzes werden andere Sanktionen in den Vordergrund treten, wie z. B. das Verbot oder die Einstellung einer bestimmten Tätigkeit, oder aber eine positive Regulierung der Sache durch die Bestimmung des künftigen Verhaltens der Parteien. Der heutige Mechanismus der zivilrechtlichen Haftung ist auf einer vom Schadenersatz ausgehenden Risikoverteilung aufgebaut. Es ist sehr problematisch, ob und wie die Grundbegriffe dieses Systems in einer ganz anderen Interessenabwägung genutzt werden können, und — anstelle des Verschuldens — wie diese Interessenabwägung standardisiert werden kann.

Die erwähnten Neuigkeiten sind schon — wenigstens in ihren Anfängen — auch im ungarischen Recht vorzufinden. In der Rechtsprechung der Zivilgerichte verbreitet sich die indirekte Revision von Verwaltungsbeschlüssen. Die Novelle des ZGB von 1977 brachte den (wenn auch sehr bescheidenen) Versuch eine Bürgerklage auf dem Gebiet des Verbraucherschutzes zu institutionalisieren. Daß die neue Aufgaben der Richter, und besonders ihre Rolle als Gegengewicht der Verwaltung zukünftig nicht mehr umgangen werden können, zeigt auch die Neuregelung der Persönlichkeitsrechte in der ZGB-Novelle. Diese bestimmt, daß die elektronische Datenverarbeitung die Persönlichkeitsrechte nicht verletzen soll, die Daten Unbefugten nicht herausgegeben

werden dürfen, weiterhin, daß über die gespeicherten Daten der Betroffene auf Verlangen informiert werden soll. Diese Information kann ihm nur verweigert werden, wenn dadurch „staatliche Interessen oder die Interessen der öffentlichen Sicherheit verletzt würden". Der Betroffene hat auch Recht auf die Berichtigung. (ZGB § 83.) — Die weitere Bestimmung aber, nach der es den Ministerien ermöglicht wurde, hinsichtlich des Berichtigungsrechts den Verwaltungsweg der gerichtlichen Geltendmachung voranzustellen, kann rechtspolitisch nur als Rückschritt gewertet werden (Einf G. ZGB § 3.). Und zur Zeit steht noch auch die Grundsatzfrage offen: ob die Gerichte auch darüber entscheiden können, daß durch die Ausgabe der Information wirklich Staats- und Sicherheitsinteressen verletzt würden?

b) All diese Änderungen beeinflussen den Status der zivilrechtlichen Rechtsverhältnisse unter den anderen Rechtsverhältnissen: sie verlangen eine Bewußtmachung des aktuellen hohen Wertes der „Autonomstruktur" des Zivilrechts. Das klassische Zivilrecht war wirklich das Recht des Bürgertums, und seine zentrale Rolle war auch berechtigt in einer Gesellschaft, die von dem Markt beherrscht wurde. Die Veränderung des Charakters des Zivilrechts (die oft bis zur Aufgabe seiner Identität reicht) ist allgemein bekannt, und allgemein anerkannt — jedoch nur in Bezug auf die wirtschaftlichen Verhältnisse, deren Politisierung jedermann zur Kenntnis nimmt.

Was aber die Lebensverhältnisse anbetrifft, die etwa außerhalb der Hauptströmung der wirtschaftlichen Entwicklung geblieben sind, ist die Ungleichmäßigkeit der Entwicklung auffallend: sie bilden ein Reservat aus dem 19. Jahrhundert. Als solche können wir z. B. die schadensrechtlichen Sachverhälte nennen, die keine Beziehung zu den Betriebs- und Verkehrsunfällen (oder anderen „technischen" Schäden) und so zur objektiven Haftung haben; aber auch die „neutralen" Fälle des Persönlichkeitsschutzes. In den sozialistischen Ländern, in denen ein selbständiger Rechtszweig „Wirtschaftsrecht" gebildet wurde, büßten die dem „Zivilrecht" übriggelassenen Verhältnisse ihre Bedeutung ein.

Die gesellschaftliche Entwicklung pausierte aber auch in den Sphären außerhalb der „großen Wirtschaft" nicht. Nur weil die „autonome Struktur" des Zivilrechts immer noch mit den „Warenverhältnissen" identifiziert wird, können die nach ihrer Gleichheit modellierten Rechtsverhältnisse der Bürger — die Institute des tschechoslowakischen ZGB hier als Symbole verwendend — auf „persönliche Nutzung von Wohnräumen" oder „Verkauf in Läden" reduziert werden.

Die Notwendigkeit der schon erwähnten Schutzfunktion, und deren neue Rechtsinstitute weisen auch auf die Unhaltbarkeit solcher „Reservat"-Auffassungen hin. Die verschiedenen „Schutz"-Institute funktionieren als Vermittlung zwischen den Sphären der Politik bzw. der schon politisierten Wirtschaft und andererseits der „autonomen Struktur"; sie politisieren die letztere und erweitern ihr Wirkungsfeld weit über die ursprünglichen Vermögensverhältnisse hinaus. Dafür ist der häufige Funktionswandel von dieser althergebrachten Sphäre angehörenden Instituten wie

die des Nachbarrechts (im Umweltschutz) oder des Schutzes der Ehre (in zahlreichen politischen Rollen) ein Zeichen.

Die gleiche Position der Parteien im Zivilprozeß und die „Gleichheit" der autonomen Struktur können heute zu Korrektion der faktischen Ungleichheit der (Kräfte) der Parteien nutzbar gemacht werden. Eine in diesem Geist arbeitende Zivilrechtsprechung ist in Ungarn umso mehr zu wünschen, als das hiesige System die Verwaltungsgerichtsbarkeit nicht kennt, und der neuerlich vom Staat auf die Bürger verschobene Schutz[52] vor den Zivilgerichten realisiert werden sollte. Die oben besprochene Politisierung der Persönlichkeitsrechte, die eigentlich Gruppeninteressen dienenden Prozesse, wie die Bürgerklagen im Umwelt- und Verbraucherschutz zeigen die noch vorhandenen Möglichkeiten der autonomen Struktur in der Entwicklung der Demokratie. Ein mehr konkreter Umriß dieser Perspektive verlangte die praktische Entfaltung der „Schutz"-Institute. Dieser Gedankengang führt aber schon zu unserem Ausgangspunkt zurück: zu der rechtspolitischen Wichtigkeit der Aktivierung des Schutzes der Persönlichkeitsrechte.

Права личности. Тенденции развития и противоречия

Л. Шойом

Во второй части автор подвергает пересмотру те вопросы прав личности, которые чаще всего обсуждены до сих пор в социалистической цивилистике, а именно — взаимосвязь прав личности с имущественными отношениями и соотношение общих и отдельных специальных личных прав. Автор на такой позиции, что права личности сложились в конце XIX века для защиты владельцев (ведь они компенсировали упадок шанса самоохраны в либеральном смысле слова). В то время это дало политические содержание правам личности: указанное право явилось одним из антилиберальных генеральных клаузул. По сравнению с этим специальные личные права были центральными с политической точки зрения.

В третьей части представлены современные тенденции прав личности. После второй мировой войны личные права охарактеризованы приобретением политического и всеобщего характера, в особенности же — связыванием с конституционными правами и свободами.

Четвертая часть — попытка для характеристики прав личности их внутренними противоречиями. В крайних пределах автономии личности и полной ее интеграции в общество права личности — являясь одновременно средствами охраны и источниками опасности — могут обеспечить бестягостный простор личности.

[52] Die Schutzfunktion kehrt sich um: Nach der Stabilisation der Macht ist nicht mehr der Staat gegen die Bürger, sondern der Bürger vor dem Staat zu schützen. (S. neuer § 349 ung. ZGB über die Staatshaftung; Eörsi, Gy.: Tézisek a polgári jogi felelősségről) (Thesen über die zivilrechtliche Verantwortlichkeit). Állam- és Jogtudomány, 1976. p. 185, 200.

The privacy. Development trends and controversies

L. SÓLYOM

The paper is an introduction to the theoretical survey of personality rights.

Part II critically examines the most debated problems of privacy in the Soviet civil law literature: the relation of privacy to the property rights and the relation between the "general personality right" and some special torts of privacy. According to the author the right of privacy emerged at the end of the 19th century as the protection of owner (i.e. the deterioration of the self-protection in the liberal sense was compensated that way). Then this gave the political substance of general personality right: this right was one of the anti-liberal general clauses. On the contrary the special privacy rights are politically neutral.

Part III presents the recent trends of privacy rights. After World War II the privacy rights are characterized by their political substance and generalisation, especially their growing connection with the constitutional rights of freedom.

Part IV is an attempt to characterize the privacy by their inner controversies. Between the extremities of individual autonomy and the total integration to the society the privacy rights—they are protective means and sources of danger themselves—ensure acceptable margin for the individual to an antonomous activity.

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Kann die Rechtswissenschaft Gesellschaftswissenschaft sein?

A. SAJÓ

Wissenschaftlicher Mitarbeiter des Staats- und Rechtswissenschaftlichen Instituts der Ungarischen Akademie der Wissenschaften

Die Übernahme der modernen gesellschaftswissenschaftlichen Kenntnisse ging in den verschiedenen Zweigen der kontinentalen und der sozialistischen Rechtswissenschaften in abweichendem Maß vor sich. Die Übernahme spielte sich unter unterschiedlichen geschichtlichen Umständen ab, dementsprechend spiegeln sich in den rechtswissenschaftlichen Zweigen die zur Zeit der Übernahme herrschenden gesellschaftswissenschaftlichen Erwartungen. Darin daß die Rechtswissenschaft effektiv zur Gesellschaftswissenschaft wird, bildet auch jene gesellschaftliche Funktion ein Hindernis, die die Rechtswissenschaft zu erfüllen berufen ist.

Die Auffassung der Wissenschaftlichkeit als Fahndung nach der Gesetzmäßigkeit verursacht für die juristische Theoriebildung Schwierigkeiten. Dazu müßte nämlich der Jurist sein eigenes Fach überschreiten, oder müßte sich in die sterile Welt der rechtlichen Strukturen verschließen. Rechtstheoretisch ist es hinreichend, wenn Hypothesen mit erklärender Kraft zur Verfügung stehen, und es muß nicht das „Wesen" der rechtlichen Erscheinungen erschließen werden. In der Rechtswissenschaft vereinfacht sich das Programm der „Wesenserschließung" zur Begriffsforschung.

Der Vorgang, daß die Rechtswissenschaft zur Gesellschaftswissenschaft wird, hat immanente Schranken (z. B. Antropomorphismus). Das ändert aber nichts an der Sache, daß die Rechtswissenschaft als Wissenschaft behandelt werden soll (d. h. daß die Kenntnisse durch Mitwirkung eines offenen wissenschaftlichen Publikums entwickelt werden), und es bedeutet nicht daß es nicht möglich wäre auf dem Gebiet der Theoriebildung weiter zu schreiten.

1. Entwicklungen in der Gegenwart

Ist es vorstellbar, daß die durch die Freirechtschule verpöhnte „Kryptosoziologie" (d. i. die verhehlte Inachtnahme der gesellschaftlichen Tatsachen unter dem Deckmantel der begrifflichen Subsummierung) ihren Platz in der Rechtswissenschaft der Pseudosoziologie räumt? Verbirgt sich hinter der Losung „Wirklichkeitsanspruch" die Willkür oder in besserem Fall eine traditionelle dogmatische Darlegung, verhüllt in moderne Terminologie? Es gibt Zeichen, die das glauben lassen, besonders in den Fachrechtswissenschaften, wo der *überwiegende Teil der Mitteilungen einer normativen* und nicht einer gesellschaftswissenschaftlichen Paradigma entspricht. Die rechtstheoretische Rechtssoziologie produziert bis heute bloß Theorien darüber, wie sie aussehen könnte wenn sie wüßte, wie sie aussehen soll, aber im Vordergrund der *Forschungen* steht die Inachtnahme der „Wirklichkeit". Diese Wirklichkeit ist aber eher rechtlichen (normativen) als gesellschaftlichen Charakters. Eine rechtliche „Tatsache" ist neben der Rechtsnorm auch die Gerichtspraxis, aber die Inachtnahme

der außergerichtlichen Rechtspraxis (z. B. Gewohnheiten, Vertragsregeln usw.) wird beinahe in demselben Maß für außerrechtswissenschaftliche Soziologisierung gehalten, als zu Zeiten Eugen Ehrlichs. Die einzelnen fachrechtswissenschaftlichen Zweige verhalten sich unterschiedlich; an einzelnen Gebieten kommt die Paradigma einer reinen Rechtswissenschaft fast der kelsenischen Ideologie entsprechend zur Geltung. Hauptsächlich kommt es im Staatsrecht und Staatsverwaltungsrecht zu einer solchen Säuberung. Auch im internationalen Recht, wo angesichts der Unentwickeltheit des Normenmaterials zu erwarten wäre, daß die Synthese der „Wirklichkeitswissenschaft" und der „Normwissenschaft" zustande kommt, ist das die Haupttendenz. Diese werden durch Politikwissenschaft, Soziologie und Organisationswissenschaft abgelöst, oder sie werden parallel ausgebaut. Das Verwaltungsrecht ist das charakteristische Gebiet, das während der Herrschaft der rechtlichen Weltanschauung seine Macht auf die traditionellen kameralistischen Gebiete erstreckte, und diese dann, in der Periode der Anforderungen der modernen Verwaltung und des Rückfalls des Rechts, neuen Fachwissenschaften — Ökonomie, Soziologie, Organisationswissenschaft — abtritt. In dieser antidogmatischen Wendung spielt der Positionsverlust der Juristen in der Verwaltung eine nicht zu vernachlässigende Rolle (SZAMEL, 1976, 258). In den wider auf die traditionelle Dogmatik beschränkten Fachrechtswissenschaften verursachen die — aus wissenschaftssoziologischem Gesichtspunkt „gewöhnten" — Schwierigkeiten Probleme. Anders verhält es sich bei den zwischen den Rahmen der Rechtswissenschaft gebliebenen neuen Wirklichkeitwissenschaften (Rechtssoziologie) und der innerhalb der die traditionelle Struktur wahrenden Fachwissenschaften (z. B. Zivilrecht) gebliebenen gesellschaftswissenschaftlich orientierten Teilelemente.

Aus dem Gesichtspunkt der Wirksamkeit der Gesellschaftslenkung ist jedenfalls die Inachtnahme gewisser Realitäten unentbehrlich. Diese Wirklichkeitsempfindlichkeit ist unmittelbar und in erster Linie mit der wissenschaftlichen Begründung der Rechtsschaffung verbunden. Wie es KULCSÁR (1976, 103) betont, trat die Behandlung des Rechts als Instrumentalproblem in den Vordergrund, wodurch die Rechtswissenschaft bedeutend umgestaltet wird, indem, im Gegensatz zur Ausschließung der Rechtspolitik, unter dem früheren Namen „Naturrecht" und „Politik" nun versucht wird diese in die Rechtswissenschaft zu integrieren. Diese wissenschaftliche Begründung hat freilich Grenzen, und zwar nicht nur infolge der wissenschaftlichen Entwicklung, sondern auch wegen der Erwartungen der Rechtspolitik. Die Rechtspolitik beziehungsweise die durch sie beeinflußte Rechtsgestaltung ist nämlich genau so eine soziologische Realität, wie zum Beispiel die Rechtsanwendung, sie wird also von verschiedenen Interessenüberlegungen, oder gar durch irrationale Mechanismen ziemlich stark beeinflußt. Dieser Umstand stellt der wissenschaftlichen Erkenntnis im vorhinein schon Schranken.

Andererseits machten die Bedeutung der richterlichen Rechtsgestaltung (beziehungsweise deren Ausbreitung auf dem Kontinent), und die sich daran knüpfenden Interessen die Forschung der gerichtlichen Entscheidungen notwendig. Traditionell war es — zumindest theoretisch — zur Entscheidung hinreichend die

Rechtsnorm richtig zu kennen. In den zwanziger-dreißiger Jahren erwies sich das im ohnehin fallrechtlich eingestellten amerikanischen Rechtsleben für ungenügend, beziehungsweise es war die Rechtspraxis, wegen der konservativen, an dem Dogmatismus der Begriffsanalyse beharrenden richterlichen Stellungnahme, unfähig, sich der gesellschaftlichen Wirklichkeit des Monopolkapitalismus anzuschließen. Das führte zu einer Krise im Rechtsleben, die sich dann später, während der großen Wirtschaftskrise weiter vertiefte. Unter solchen Umständen wurde die Untersuchung des rechtlichen *Verhaltens* zum unmittelbaren Ziel — wesentlich im Sinne der programmgebenden These von Holmes im Jahr 1897 (unter Recht sollen hier die Prophezeiungen bezüglich der effektiven Tätigkeit der Gerichtshöfe verstanden werden). Die realistische Rechtswissenschaft näherte sich (sowohl in ihrer fakten- als auch normenskeptischen Version) in auffallendem Maß dem comteischen positivistischen Wissenschaftsideal, indem sie die Vorhersage in den Vordergrund stellte.

Auf die Wirkung der erwähnten Bestrebungen bildeten sich Rechtswissenschaftsgebiete, die irgendeine Art der Inachtnahme der Wahrheit vor Augen hatten, so insbesondere die Rechtssoziologie und die Kriminologie. Die nicht Normen, sondern die Wirklichkeit forschenden juristischen Wissenschaften entwickelten sich, eben wegen ihrer Zugehörigkeit zur Rechtswissenschaft, in einer ziemlich verzogenen Art. Gut wahrnehmbar ist das bei der Kriminologie, wenn sie ihre Tätigkeit als eine durch die Behörden des Gefängnis, beziehungsweise Justizwesens institutionell beeinflußte Wissenschaft ausübt.

In sonstigen fachrechtswissenschaftlichen Zweigen ist die Trennung entweder komplett — wie das beim Staatsverwaltungsrecht der Fall war — oder es ist eine zusammenhängende, aus juristischem Gesichtspunkt betrachtete theoretische Inachtnahme der Realität in noch minderem Maß möglich. Das hängt mit den hinter der Regelung tätig werdenden gesellschaftlichen Kräften zusammen: ein bedeutender Teil der Wirtschaftsverhältnisse und ein sehr bedeutender Teil der politischen Verhältnisse wird nämlich in die außerrechtliche Sphäre abgeschoben, sie werden der rechtlichen Regelung entzogen. Bei der Untersuchung der Wirtschaft müssen die Grenzen des rechtlich geregelten Bereiches wesentlich überschritten werden, wenn wir die zum Unsinn führende Isolierung auch nur einigermaßen vermeiden wollen, (wenn wir also zum Beispiel beim Vertragsrecht bloß einen an sich unverständlichen Teil des Umsatzes in Betracht ziehen würden). Die Untersuchung dieser gehört daher gar nicht in den Bereich der juristischen Wissenschaften. Wo jedoch eine umfangreichere Analyse innerhalb der rechtswissenschaft vorgenommen wird als es juristisch gegeben ist, geht es gewöhnlich im Zeichen der aus der Zeit des großen Durchbruchs nach der Jahrhundertwende noch erhalten gebliebenen wissenschaftlichen Vorstellungen und des damaligen sozialischen Begriffsystems vor sich. Die Wege der Rechtswissenschaft und der Soziologie kreuzten sich damals auf einem verhältnismäßig niedrigem Niveau der Entwicklung der Soziologie beziehungsweise der Gesellschaftswissenschaft, zu einer Zeit, als deren Begriffsystem noch allgemein verständlich und leicht zu übernehmen war. Diese Übernahme vollzog sich, seither aber entwickelten sich die

Gesellschaftswissenschaften, so auch die Soziologie, in außerordentlichem Maß, sie wurden mehr komplex und überholten sowohl inhaltlich, als auch strukturell ihre zur Zeit der ersten Berührung vorhandenen Eigenschaften (LUHMANN, 1872, 201). Davon will aber die Rechtswissenschaft im allgemeinen nichts wissen. Sie glaubt die ehemaligen Anforderungen der Soziologie befriedigend, die Wirklichkeit kennenlernen, und den Rechtspositivismus überholen zu können. Jene rechtswissenschaftlichen Werke, die im Geiste des positivistischen Szientismus über die Bewegung des Rechts Zusammenhänge festzustellen trachten, bringen gewöhnlich leere Gemeinplätze. Dagegen kann sich auch die sozialistische Rechtswissenschaft nicht währen. Nicht nur die Fachrechtswissenschaften, aber auch die allgemeinste Rechtstheorie begeht diesen Fehler.

Es liefert kein beruhigendes Ergebnis, wenn sich der Rechtswissenschaftler einzelnen „zuständigen" Fachwissenschaften zuwendet. Die Fachwissenschaften suchen nämlich Antwort auf ihre eigenen Probleme, deshalb können sie kaum adaptiert werden. Eine praktische, jedoch wesentliche Schwierigkeit besteht darin, daß wenn das Rechtswissenschaftsproblem ein aktuelles gesellschaftliches Problem ist, dann handelt es sich wahrscheinlich um ein auch für die Gesellschaftswissenschaften aktuelles, das heißt ungelöstes Problem. Es gibt besonders in der Rechtstheorie Bestrebungen, die die Ergebnisse anderer Wissenschaften in der Rechtswissenschaft geltend machen wollen, so wird zum Beispiel sprachwissenschaftliche, semantische Analyse oder irgendeine moderne Logik empfohlen. Abgesehen von der Soziologie wird die „Verwissenschaftlichung" der Rechtswissenschaft gewöhnlich von der Mitwirkung irgendeines interdisziplinären „allgemeinen" Wissenschaft erhofft; die Fachrechtswissenschaften leisteten diesen Erscheinungen (nicht zuletzt wegen ihrer stark formalisierten, das heißt spezielle Adaptationsfachkenntnisse beanspruchenden Sprache) Widerstand. LUHMANN's scheinbar logischer Vorschlag (1972, 204—208), wonach die Rechtswissenschaft soll Systemtheorie oder Entscheidungstheorie sein (oder die Rückkuplung von Entscheidungsproblemen auf die Systemtheorie) ließ die Funktionierung des Rechts zum größten Teil außer Acht.

Wenn aber in den Fachrechtswissenschaften, und zum Teil auch in der Rechtstheorie, die soziologische Betrachtungsweise nur ein Stielmerkmal ist, oder zumindest nicht viel mehr, als die Inbetrachtnahme von rechtlichen Tatsachen, die außerhalb der Gerichtspraxis liegen, wenn trotz der gesteigerten Betonung des Instrumentalcharakters des Rechts die Rechtspolitik noch immer nicht selten eher das sich den Wertern anpassende Naturrecht (Ideologie) und nicht die tatsächlichen Zusammenhänge benötigt, so, ist das nicht ausschließlich dem Recht anzurechnen. Infolge der speziellen Bewegung der Gesellschaftswissenschaften interessiert sich die Soziologie wenig für das Recht. Wissenschaftssoziologisch ist diese Verschließung verständlich, da ja die Soziologie eben jene Gebiete zu erobern trachtet, die keine eigene Wissenschaft haben. Einzelne meinen, daß auch die Verschlossenheit des juristischen Fachs und auch der normative Charakter des Rechts Hindernis bildet. Die traditionelle Frage der Soziologie richtet sich dazu immer noch auf das Informelle, da

sie zu erklären wünschte, was noch nicht erklärt ist. (HUNT, 1978. 140). Die Rechtswissenschaft läuft nicht der Gefahr durch die Gesellschaftswissenschaften verschlungen zu werden; der „soziologische Imperialismus" (SZABÓ, 1977. 17.) verschluckte eher nur die Vorworte und die einleitenden Kapitel, allgemeine Grundlagen genannt. Aber die ursprüngliche Frage blieb (ihre „Ursprünglichkeit" größtenteils wahrend): inwieweit wird die Rechtswissenschaft Wissenschaft, insbesondere Gesellschaftswissenschaft?

2. „Gesetzmäßigkeiten"

Im weiteren soll also untersucht werden, inwieweit die rechtswissenschaftliche Erkenntnis gesellschaftswissenschaftlichen Charakter haben kann. Im Zusammenhang mit der marxistischen Rechtswissenschaft ist die Gesellschaftswissenschaftlichkeit die herrschende wissenschaftstheoretische Standpunkt. Diese Auffassung ist kein Privileg der marxistischen Rechtswissenschaft. Diese Annäherung ist mindestens seit der Gesellschaftsauffassung von Spencer in der Rechtswissenschaft anwesend. Sogar auch die, die den Standpunkt vertreten, daß die Rechtswissenschaft Normativwissenschaft ist, sehen die Gesellschaftlichkeit des Rechts ein, das ungelöste Problem auf der Oberfläche ist nur, *was sich aus dieser Gesellschaftlichkeit für die Rechtswissenschaft ergibt.* Ein passendes Beispiel für diese Halbheit gewährt JÖRGENSEN (1970, 13): „Die Rechtswissenschaft ist... eine empirische Wissenschaft, da sie auf realen Erscheinungen gründet. Diese empirischen Erscheinungen sind ... gesellschaftliche Erscheinungen, da sie mit den Mustern des menschlichen Verhaltens verbunden sind. Der Gegenstand der Rechtswissenschaft sind aber nicht diese ... sondern die über diese herrschenden Normen." (Derselben Meinung ist z. B. auch ALBERT, 89.) Die Anhänger der positivistischen Wissenschaftstheorie stellen das gesellschaftswissenschaftliche Wesen der Rechtswissenschaft in Abrede, aber bloß wegen des Erkenntnisinteresses. Cossio zufolge ist die Wissenschaft des rechtlichen Verhaltens, die wir durch Normen kennenlernen (KALINOWSKI, 1969, 2).

Die Klassiker des Marxismus-Leninismus befaßten sich mit dem Staat und dem Recht immer als gesellschaftliche Erscheinung. Sie stellten in Abrede, daß das Recht ein abstraktes, willkürliches, mystisches geistiges Gebilde wäre und bauten es in ihr über die gesellschaftliche Totalität geschaffenes materielles System ein, in welchem die grundlegende Priorität der Wirtschaftsverhältnisse gegenüber dem Recht eindeutig war. Die marxistische Theoriebildung behandelte — infolge ihres Charakters (ihres Ziels) — das Recht aus dem Gesichtspunkt der grundlegenden Gesellschaftsverhältnisse, aus dem Gesichtspunkt der Rolle der staatlichen-rechtlichen Institutionen im Klassenkampf, beziehungsweise ihres Zusammenhangs mit jenen.

Gemäß der sozialistischen Rechtswissenschaft der Gegenwart ist die sich mit dem Staat und dem Recht befassende Wissenschaft, da dieselben gesellschaftliche Erscheinungen sind, Gesellschaftswissenschaft. Die Gesellschaftswissenschaften

befassen sich mit der Erkennung des gesellschaftlichen Seins und gesellschaftlichen Bewußtseins, aber nicht allgemein, sondern nach Gegenständen gesondert. Da sich die Rechtswissenschaft mit dem Recht beschäftigt, soll die Rechtswissenschaft Gesellschaftswissenschaft sein. Diese Argumentation ist bestreitbar.

a) Eine „Beschäftigung" mit einer Erscheinung ist noch keine „Wissenschaft".

b) Die Aufteilung der Wissenschaften objektmäßig in zwei große Gruppen ist schon aus dem Gesichtspunkt der Objekte der Aufteilung nicht ganz überzeugend. In neueren, nicht rechtswissenschaftlichen Werken werden z. B. die mit dem Denken zusammenhängenden Wissenschaften als eine separate dritte Gruppe erwähnt. Abgesehen davon, *was ist der Sinn einer solchen Aufteilung?* Meiner Ansicht nach vor allem das, daß dadurch für die mit den gesellschaftlichen Erscheinungen zusammenhängenden weniger vertrauenswürdigen Theorien der wissenschaftliche Status zu erkannt wird ohne gezwungen zu sein den peinlich exakten Maßstab der Naturwissenschaft ständig anzuwenden. Die Unterschiede zwischen Natur und Gesellschaft sind natürlich grundlegend und das gesellschaftliche Bewußtsein erschwert die Erkenntnis des gesellschaftlichen Seins in bedeutendem Maß, deshalb weisen die mit der Gesellschaft zusammenhängenden Kenntnisse zahlreiche Sonderheiten auf. Nichtsdestoweniger spiegelt, schon angesichts der Einheit der Bewegung der materiellen Welt, die Zweiteilung nach obigem Objekt nicht sosehr die inneren Probleme der Wirklichkeit, als eher die der Wissenschaft. Aus der „Gesellschaftswissenschaftlichkeit" folgt nämlich — außer der Feststellung, daß die naturwissenschaftlichen Methoden und Kriterien unanwendbar sind — überhaupt gar nichts. Es könnte vorgebracht werden, daß die Gesellschaftswissenschaft die gesellschaftlichen Gesetzmäßigkeiten kennenzulernen trachtet, da aber die Kenntnis der Gesetzmäßigkeit gemäß der marxistischen Auffassung von der Wissenschaft im allgemeinen zu erwarten ist, bedeutet die „Gesellschaftswissenschaftlichkeit" auch in dieser Beziehung kein Plus.

Das Bestreben die Gesetzmäßigkeit zu sichern ist natürlich keine Spezialität der Rechtswissenschaft. Die mit der inneren Krise kämpfenden heutigen Humanwissenschaften sind im allgemeinen wegen der Nichterfüllung ihrer nomologischen Bestrebungen benachteiligt (GRZEGORCZIK, 183). Nichtsdestoweniger hat die Fahndung nach der rechtswissenschaftlichen Gesetzmäßigkeit, eine derartige Annäherung der rechtswissenschaftlichen Probleme, einen sehr speziellen geschichtlichen Hintergrund, ohne welchen die ähnlichen Bestrebungen der Gegenwart unverständlich wären. Die Wurzeln reichen bis zur rechtlichen Krise des vorigen Jahrhundertsende zurück, die ja auch eine Krise der rechtpositivistisch gepflogenen, die tatsächliche Wirklichkeit auf die Rechtsnormen beschränkenden Rechtswissenschaft gewesen ist. Unter diesen Umständen wurde auch die Wissenschaftlichkeit der sich auf die Paradigma der „rechtlichen Wirklichkeit" stützenden positivistischen Rechtwissenschaft in Frage gestellt. Das neue rechtlich relevante Wirklichkeitsmodell mußte von dort genommen werden, wo es schon bereit lag, nämlich von den Wissenschaften, genauer gesagt aus den Gesellschaftswissenschaften, die derzeit durch die die

Wirkungen der naturwissenschaftlichen Erkenntnis spiegelnde positivistische Anschauung durchdrungen ist.

Das Comte'sche (beziehungsweise diesmal das Spencer'sche) Programm faßte Pulszky klar zusammen: „Die Rechts- und Staatsphilosophie hat — wie jede Wissenschaft — zwei Aufgaben: die Gesamtheit der existenden empirischen Erscheinungen zu erklären und das Mögliche, das in der Zukunft zu Erfahrende festzustellen; die über die Verhältnisse herrschenden Gesetze aus der Vergangenheit und aus der Gegenwart herauszufinden und die Funktionierung derselben für die Zukunft zu berechnen; das Bestehende zu begründen und daraus Folgerungen zu ziehen darauf, was sein soll; demzufolge gehören die Probleme des Ursprungs und des Künftigen in ihren Bereich." (PULSZKY, 1885, 41). Es ist also die zentrale Bedeutung der Gesetzmäßigkeit verständlich; sie wird nach dem Muster der naturwissenschaftlichen Gesetzmäßigkeit gebildet und als grundlegend kausal angesehen.

Die Fahndung nach der Gesetzmäßigkeit als Kriterium der Wissenschaftlichkeit der Rechtswissenschaft wurde aber gleichzeitig die Quelle unermeßbarer Schwierigkeiten. Im Sinne dieses Gedankenganges bestünde die Aufgabe der Rechtswissenschaft in der Erkennung der gesellschaftlichen Gesetzmäßigkeiten des Rechts. Wenn wir zur Erfassung der gesuchten Gesetzmäßigkeiten des Rechts die tatsächlichen Zusammenhänge liefern wollen, müssen wir die streng genommene rechtliche Sphäre ununterbrochen überschreiten. In diesen Fällen muß der Rechtswissenschaftler (auch) andere Wissenschaften, zum Beispiel die Politik, die Soziologie usw, pflegen, oder zumindest die Ergebnisse anderer Wissenschaften gebräuchlich machen, ohne daß dadurch neue Resultate entstehen würden. In den Fachrechtswissenschaften meldet sich diese Schwierigkeit in konkreter Form derweise, daß versucht wird ein gegebenes Regelungsobjekt (Institution) mit dem Objekt der Regelung in Verhältnis zu stellen. (Zum Beispiel die eigentumsrechtlichen Normen mit dem Eigentum als gesellschaftliche Institution.) Diese funktionelle Annäherung bringt aber aus mehreren Gründen kein zufriedenstellendes Ergebnis:

a) Der Rechtswissenschaftler ist nicht im Stande die soziologische usw. Analyse durchzuführen. Die faktische Interessenverhältnisforschung zum Beispiel, die die Rechtsanwendungsorgane innerhalb der gesetzlich gegebenen Rahmen durchführen, entspricht nicht den neuzeitlichen Erfordernissen der soziologischen Erkenntnis (LUHMANN, 1974, 10). Das ist es aber gerade, was die theoretische Rechtswissenschaft im Laufe der Verarbeitung der Jurisprudenz „ererbt.". Die theoretische Rechtswissenschaft kann sich zweifellos auch kritisch dazu verhalten, indem sie nachweist, wie und nach welchen Gesichtspunkten dieses normative „Interesse" von dem soziologischen Interesse abweicht (vorausgesetzt, daß ein solches soziologische Material zur Verfügung steht und es gehandhabt werden kann). In diesem Fall hat sie sich aber von der eng genommenen Rechtswissenschaft sehr weit entfernt, und es ist eben kein Zufall, daß derartige Forschungen effektiv kaum existieren.

b) Die Theorien können auch schon wegen ihres abweichenden Niveaus miteinander nicht verbunden werden. Die sich auf die Institution (konkrete Regelung)

beziehende Theorie kann einer auf eine Totalität bauenden gesellschaftlichen Theorie nicht angepaßt werden. Die Folge ist im besten Fall eine Einfügung in ein isolierendes gesellschaftliches Wirklichkeitsbild, das höchstens die Umrisse einer längst überholten soziologischen Theorie ahnen läßt. Man sieht das, wenn zum Beispiel eine Rechtsinstitution mit einer mechanistisch aufgefaßten Interessenkonzeption verbunden wird, zum Beispiel: das Urheberrecht wird mit den Interessen der Verleger in Zusammenhang gebracht. Es wäre allerdings noch eine Möglichkeit, namentlich, daß die Rechtswissenschaften die Gesetzmäßigkeiten ihrer eng genommenen Untersuchungsfelder festlegen, und das wird auch in der Tat weitgehend angestrebt. In diesen Fällen werden die eng genommenen rechtlichen Strukturen und deren Gesetzmäßigkeiten untersucht. Formell stellte sich auch VISCHINSKIY (25) auf diesen Standpunkt: „Die sowjetische Rechtswissenschaft ist ... eine die Grundprinzipien des Aufbaus des sowjetischen Rechts verallgemeinernde wissenschaftliche Theorie." In dieser Auffassung wären zum Beispiel das Verhältnis der zentralen und der lokalen Normen, oder die sich auf die Grundlagen der Gliederung des Rechtssystems beziehende Gesetzmäßigkeit, oder die gemäß der gegebenen Eigentumsregelung möglichen letztwilligen Verfügungssysteme usw. Gesetzmäßigkeiten. Unserer Meinung nach ist es zweifelhaft, ob im Zusammenhang mit diesen eine Gesetzmäßigkeit feststellbar ist, beziehungsweise das, was festgestellt werden kann, ist nicht sosehr rechtlichen, als eher politischen oder wirtschaftlichen Charakters. (Das Verhältnis der zentralen und der lokalen Normen ist von dem Verhältnis der zentralen bzw. lokalen Gewalt abhängig: die seitens der Anthropologen nachgewiesenen Zusammenhänge zwischen dem Eigentums- und dem Erbfolgesystem haben nicht rechtlichen, sondern wirtschaftlichen usw. Charakter.)

Dieser Standpunkt entspricht aber nicht den Ausgangsanforderungen, er entspricht nicht den herrschenden Auffassungen über die Gesellschaftlichkeit des Rechts beziehungsweise der rechtlichen Erscheinungen. Demgemäß würde nämlich die Nachweisung der gesellschaftlichen Gesetzmäßigkeit des Rechts eine Rückleitung auf einen *par excellence* für „gesellschaftlich" erachteten Zusammenhang, auf etwas „wesentlich Gesellschaftliches" bedeuten. Das kommt klassisch zum Vorschein, wenn die Rechtswissenschaft hinter dem Rechtsverhältnis das entsprechende Lebensverhältnis, beziehungsweise Gesellschaftsverhältnis auffinden muß. Eine derartige Auffassung der Rechtswissenschaft, beziehungsweise des Rechts wurde von PESCHKA (1980) auf eine fetischistische Verzerrung einer grundlegenden marxistischen Erkenntnis zurückgeführt. Theoretisch handelt es sich hier um eine Mißinterpretation der Vorstellung „Recht als Form". Einerseits können nämlich gemäß der marxistischen Gesellschaftsauffassung die gesellschaftlichen Erscheinungen nur ihrer Totalität richtig interprätiert werden, demzufolge ist jede isolierte Auffassung entstellt und falsch. Die sich mit den rechtlichen Erscheinungen befassende Gesellschaftswissenschaft darf das Recht nicht isolieren und das gilt auch für die durch die Fachrechtswissenschaften untersuchten Erscheinungen, (wobei die Isolierung aber, angesichts deren Aufgaben, unvermeidlich erscheint). Andererseits ist aber — gemäß

den vorhin gesagten — das Recht genauso eine gesellschaftliche Erscheinung, wie alle übrigen, sagen wir z. B. die Wirtschaft: sie unterscheidet sich nicht in ihrem ontologischen Status. Eine andere Frage ist es, inwiefern sie fähig ist die sonstigen Sphären des gesellschaftlichen Seins zu bestimmen, beziehungsweise ob zum Beispiel die Wirtschaft über eine ontologische Priorität verfügt (PESCHKA, 1980, 264).

Wenn wir mit der Frage der rechtlichen Gesetzmäßigkeit, als der die Erkenntnis hemmenden Isolation abtun, löst sich eine Reihe von aus der gegenwärtigen Gliederung stammenden Schwieriegkeiten. Hier soll nur auf eines hingewiesen werden: Marx stellt fest, daß das Recht, beziehungsweise das Eigentum keine eigene Geschichte hat. Nun aber behandelt die Fachrechtswissenschaft, als sie sich den „wissenschaftlichen" Standpunkt zu eigen macht, die Gesetzmäßigkeiten einer gegebenen Institution genetisch; sie untersucht wie sich die bezügliche Regelung weitergestaltet hat (zum Beispiel das Arbeitsverfahren). Die vorhandenen Formen sowie die Funktionierung der Gesamtheit des Rechtsystems bestimmt in bedeutendem Maß die Entwicklung der gegebenen Institution (zum Beispiel durch die dogmatische Gebundenheit der Rechtsanwendungsorgane). Nachdem das der Fachwissenschaftler klar nachgewiesen hat, wird es ihm bange, und er fügt hinzu, daß im Hintergrund dieser Änderungen mitunter, oder, was noch schlimmer ist, „im allgemeinen", die Änderung der gesellschaftlichen Verhältnisse, oder „mehr konkreter" zum Beispiel „die Kampferfolge der Arbeiterbewegung" steht. Nun können natürlich diese letzteren Feststellungen der Wahrheit entsprechen, nur passen sie nicht in das gegebene Niveau der Theorie. Eine derartige Institutionsentwicklung ist zwar in der gesellschaftlichen Totalität vorstellbar, und eine derartige Placierung könnte auch für die Lösung des Problems notwendig sein, aber in der Darlegung der rechtswissenschaftlichen Theorie ist ihre Gegenwart in dieser unauflösbaren metaphysischen Allgemeinheit nur durch jenes *normative Verfahren* begründet, daß hinter dem Recht das „wirkliche" gesellschaftliche Verhältnis erfaßt werden *muß*. Doch ist aber das Recht selbst eine verhältnismäßig gesonderte Sphäre des gesellschaftlichen Seins. In der Theorie der „verhältnismäßigen Selbstständigkeit des Rechts" kommt eben diese Bestrebung zum Ausdruck, wenn auch nur halbwegs, als sie die offene Konfrontation vermeidet. Das hat aber dann zur Folge, daß es über keine hinreichende Durchschlagskraft verfügt. Die Momente innerhalb der Sphäre der Fachrechtswissenschaft (rechtszweigliche Momente) können untersucht werden, die Erkenntnis ist aber infolge der Isoliertheit der Darlegungen eingeschränkt.

Was uns das Programm der Gesetzmäßigkeitsforschung darbietet ist kaum mehr als Deklaration, womit man in der Theoriebildung nicht viel anfangen kann. Die Fachrechtswissenschaften tun diese entweder als obligatorisches Pensum ab, oder — und das ist der häufigere Fall — sie legen sie stillschweigend zur Seite, nachdem im einleitenden Teil deren alleinseligmachende Natur anerkannt wurde, und begnügen sich mit der *Fahndung* nach der objektiven Gesetzmäßigkeit. (JOFFE, 20.)

Aus den vorhin dargelegten ergeben sich zwei für die Rechtswissenschaft außerordentlich wichtige Folgerungen:

1. Es ist üblich die Suchung der Gesetzmäßigkeit als zentrale Aufgabe der marxistischen Rechtswissenschaft aufzufassen (KERIMOW, 1977, 31). In der sowjetischen Rechtswissenschaft ist es aber gleichzeitig eine Streitfrage, ob das Recht spezifische Gesetzmäßigkeiten hat, oder ob sie nur der Staat und das Recht gemeinsam besitzen (OBTSCHINNIKOW, 71). Aufgrund der Gesamtliteratur können im Zusammenhang mit der Entstehung, Entwicklung, Funktionierung und Struktur des Rechts grundlegende Gesetzmäßigkeiten unterschieden werden. Davon könnte schon wegen ihrer verbalen Natur jede höchstens in eine philosophische Theorie eingeordnet werden — oder sie sind unbeweisbar. Das zeigt zum Beispiel folgendes Gesetz: „Ohne wechselseitiges Entsprechen des subjektiven und des objektiven Rechts kann das Recht nicht funktionieren."

Die Gesetzmäßigkeitsfindung ist ein äußerliches Ziel; die äußerlichen Aufgaben können sich leicht disfunktionell auswirken. Die Rechtswissenschaften, besonders die Rechtszweigswissenschaften widerstehen diesem Erfordernis mit ziemlich gutem Erfolg, (die Rechtstheorie schon weniger). Der Widerstand ist übrigens der traditionellen Struktur der Fachrechtswissenschaften zuzuschreiben.

2. Wissenschaftstheoretisch genügt jene Voraussetzung, daß die Gesellschaftsverhältnisse kennengelernt werden können, und man muß nicht glauben, daß die für die gegebenen Erscheinungen aufgestellten erläuternden Theorien — auch wenn diese in dem gegebenen Zeitpunkt aufgetauchte Erscheinungen darlegen würden — sich auf das „Wesen" beziehen würde. Auch das ist nicht bestätigt, daß die Erfassung des „Wesens" jener Weg ist, der zur Erläuterung führt. Aus dem Gesichtspunkt der Theoriebildung genügt die *Hypotese* erläuternder Kraft. (MERKUROW.)

In der marxistischen Rechtswissenschaft ist es ziemlich verbreitet, daß aus gesellschaftlichen Wesen des Rechts ausgegangen wird. In einem bedeutenden Teil der Fälle ist das aber eine falsche Auslegung der marxistischen Methode. Die gesellschaftswissenschaftliche Analyse von Marx geht nämlich von dem Abstrakten und nicht vom Wesen aus. Die Forschung des „Wesens" war übrigens charakteristischerweise eine bezeichnende Bestrebung der ehemaligen Konkurrenten der modernen Wissenschaft, der Magisch-Hermetiker. Der *Essentialismus* ist nicht so sehr ein Problem der marxistischen Rechtswissenschaft als Gesellschaftswissenschaft, sondern viel eher eine uralte schlechte Angewohnheit der Rechtstheorie, die seit Platon versucht und die von der Definierung des Wesens oder der Rechtsidee bis zur Debatte der Neokantianer entartete. Die Auffassung die das Objekt der Wissenschaft auf die mit der Abstraktion identifizierte Wesen reduziert, liegt nicht fern davon, das POPPER (1963, 103) als Essentialismus kritisiert. Nach diesem Standpunkt beschreiben „die besten, die wirklich wissenschaftlichen Theorien das ‚Wesen' oder die wesentliche Natur der Dinge, jene Wirklichkeiten, die hinter den Erscheinungen stecken." Popper weist darauf hin, daß in der wissenschaftlichen Forschung keine endgültige Erklärung gibt und der Essentialismus verbietet jede weitere Frage. Er ist aber auf dem Standpunkt, daß dort wo der Zweck der Forschung angeschnitten werden kann, dort mag die

Wesensforschung begründet sein. (106.) Infolge der Objektivierung der menschlichen Schaffungen tritt anstelle der ursprünglichen Zielsetzung die jeweilige Bedeutung, beziehungsweise — geschichtlich rückblickend — die Wirkung; auch diese Art des Finalismus scheint nicht berechtigt zu sein.

Das rechtswissenschaftlich problematische Wesen der Forschung der Gesetzmäßigkeiten bedeutet nicht, daß auf dem Gebiet der durch die Rechtswissenschaft ansonsten berührten gesellschaftlichen Erscheinungen keine gesellschaftlichen Gesetzmäßigkeiten geltend werden. Diese werden aber nicht durch die heutige Rechtswissenschaft untersucht. Das ist nicht verwunderlich wenn wir bedenken, daß die für Gesetzmäßigkeiten geltenden gesellschaftlichen Zusammenhänge die rechtliche Sphäre überschreiten. (KATKITSCH, 127). Das soll nicht bedeuten, daß die Rechtswissenschaft nicht fähig wäre erläuternde Theorien darzubieten, oder daß sie nicht bestrebt wäre dies zu tun. Aber die Erläuterungstheorie der Rechtswissenschaft *konzentriert* in eigenartiger, aber geschichtlich, und auch die Funktionierung der Rechtswissenschaft betrachtet, wohlverständlicher Weise *auf die Begriffe*. „Da sich jedoch die subjektive Widerspiegelung der objektiven Gesetze in Begriffen und Kategorien realisiert, bilden diese Begriffe und Kategorien die theoretische Grundlage der Wissenschaft des bürgerlichen Rechts" — behauptet auch für andere Gattungen der Rechtswissenschaften bereichnenderweise JOFFE (21). Als jedoch die Gesetzmäßigkeitsforschung effektiv zur Begriffsforschung wird, ist das praktische Resultat der Ausbau eines der traditionellen dogmatischen Rechtswissenschaft zumindest nahe stehenden, wenn nicht gar identischen Rechtswissenschaft, unter ständiger Berufung auf die Gesellschaftswissenschaft. (LŐRINCZ, 24, UGOLOVNOYE, 214, JOFFE).

3. Welche Möglichkeiten für der Rechtswissenschaft bleiben sich zur Gesellschaftswissenschaft entwickeln

Die Wissenschaft kann als Tätigkeit und als Kenntnissystem ausgelegt werden. Diese Differenzierung auch hier angewendet, ergeben sich folgende Widersprüche:

Es ist für die rechtswissenschaftliche Kenntniserwerbung charakteristisch, daß die Rechtswissenschaftler ihren Gegenstand als Wissenschaft kultivieren. Die Objektivität der Kenntniserwerbung und ihre direkte Objektgezieltheit wird aber durch die Erschlossenheit der Rechtswissenschaft (als rechtswissenschaftliche Publikum die Interessen der Juristen, und dessen der politischen Gewalt) deformiert. (SAJÓ, 1980).

Infolge des obigen Widerspruchs weisen auch die für rechtswissenschaftlich geltenden Kenntnisse notwendigerweise und zu jeder Zeit eine spezielle Heterogenität auf. Wenn wir die als Rechtswissenschaft bezeichneten Kenntnisse untersuchen, stellt es sich heraus, daß sie über die Wirklichkeit ein ziemlich ungenaues und unvertrauenswürdiges Bild darbieten. An sich ist das aber kein Argument gegen die

Wissenschaftlichkeit. In jedem beliebigen geschichtlichen Moment übertreffen die in die Rechtswissenschaft gehörenden Kenntnisse das Alltagsbewußtsein, ohne daß das in sich zur Erfüllung des Wissenschaftsideals in naturwissenschaftlichem Sinne Hoffnung böte. In Wirklichkeit sind aber die Kenntnissysteme nicht bloß wissenschaftlich oder bloß alltäglich.

Die Wissenschaft ist ein Vorgang, ihr Kenntnissystem ändert sich. Es führt zu keinem Ergebnis mit einem Meßband zwischen Wissenschaft und alltäglicher Denkart herumzumessen und dann die Rechtswissenschaft zu degradieren. Auch in der Entwicklungsgeschichte anderer, heute für Hochwissenschaften (leitenden Wissenschaften) geltenden Wissenschaften können Abschnitte nachgewiesen werden, wo sie das Wissenschaftsideal ihres Zeitalters bei weitem nicht erreicht hatten. Im Zusammenhang mit der Rechtswissenschaft ist eher der Umstand denkwürdig, daß sich schon lange Zeit vom Wissenschaftsideal ihres Zeitalters immer mehr entfernt, ja sogar auch von ihren eigenen theoretischen Möglichkeiten. Wenn sie unseres Erachtens auch nicht fähig ist, sich in Tiefe, Objektivität, Verifikabilität bzw. Falsifikabilität ihrer Kentnisse mit den exakten Wissenschaften zu messen, könnte sie trotzdem die formellen Erfordernisse der wissenschaftlichen Theorie erfüllen (innere Widerspruchslosigkeit, Strukturiertheit, Ausschaltung der ideologisch-metaphysichen Spekulation, usw.); aber diese Tendenz kommt nicht zur Geltung, ja die Bestrebungen in diese Richtung blieben in ihrer Wirkung ergebnislos.

Es wurde schon erwähnt, daß sich die Wissenschaft von anderen Bewußtseinsformen nicht durch den Vollständigkeit der sich auf das zu untersuchende Objekt beziehenden Kenntnis unterscheidet. Die überwiegende Mehrheit ihrer akzeptierten Thesen muß sich in ihrer Zeit zweifellos bewähren, doch von einem späteren Niveau der Wissenschaftsentwicklung zurückblickend scheinen die Kenntnisse aber immer ärmlich.

Wenn wir von dem relativen, sich immer ändernden Kriterium des Kenntnisniveaus absehen, wird unser Beurteilungskriterium die *Struktur* der Wissenschaft sein. Kennzeichnend für die Wissenschaft ist, daß ihre Paradigmen, Hypothesen oder Begriffe neue Lösungen ermöglichen (RUZAVIN, 101); die Kenntnisse werden erweitert, das heißt, die Wissenschaft ist — wenn auch nicht ohne Widersprüche — strukturell kenntniserweiternd. Es ist nicht bewiesen, daß die in der Rechtswissenschaft gewählten Paradigmen, Hypothesen, Begriffe im allgemeinen kenntniserweiternd wären. Der häufige Paradigmenwechsel hängt eben damit zusammen, daß die Paradigma nicht einmal bei jenem Erscheinungsbereich angewendet werden kann, für den sie ausgearbeitet wurde. Die rechtswissenschaftlichen Begriffe ändern sich oft ohne jedwede wesentliche inhaltliche Änderung der rechtlichen Erscheinungen, bloß durch eventuelle Änderungen des Rechtstoffes (des Rechtsregeln).

Eine gewisse Entwicklung kann bei der methodischen sorgfalt, bei der Bewußtmachung der Methode beobachtet werden, das an sich konnte aber das rechtswissenschaftliche System in geringem Maß verändern. Es gibt in der Rechtswissenschaft weniger nachweisbar irrtümliche Aussagen, das dem Schein nach auch ein

Zeichen der Entwicklung der Rechtswissenschaft sein könnte. Doch der Umstand, daß es weniger Fiktionen oder solchartige Irrtümer gibt, die durch die Entwicklung anderer Wissenschaften ausgeschlossen werden (es gibt zum Beispiel weniger falschen Etymologisierungen, die so gerne von den Glossatoren angewendet worden waren), bedeutet keinen echten Fortschritt. Die Metaphysik lebt weiter, höchstens wird sie weniger ernst genommen, wie das die heutige verringerte Anwendung der Willenskonzeption betätigt. Es entstehen auch neue Metaphysiken, es verbreiten sich aus anderen Wissenschaften dort bereits veraltete, abgewetzte Begriffe und Auffassungen, die in breitem Umfang und im Vergleich zu ihrer ursprünglichen Bedeutung inadäquat angewendet werden (z. B. Interesse). Die fallweise Fortschritte fördern eher die Rationalisierung der Rechtswissenschaft als ihre Wissenschaftlichkeit. Das letzte Jahrhundert kann aber doch eine grundlegende Besserung vorweisen und das besteht in der Erkenntnis der Gesellschaftlichkeit des Rechts. Aber auch da hat sich nicht vorwiegend die Rechtswissenschaft verdient gemacht — sie hat davon lange Zeit hindurch gar nicht Kenntnis genommen —, sondern sonstige Gesellschaftswissenschaften. Eine organische Integrierung dieser Erkenntnis in der Rechtswissenschaft ist auch in der Zukunft unwahrscheinlich.

Diejenigen die sich zur Wissenschaftlichkeit der Rechtswissenschaft bekennen, begründen ihre Meinung heutzutage gerade damit, daß die Rechtswissenschaft Gesellschaftswissenschaft sei. (Eine Minderheit hält sie für eine Wissenschaft hermeneutischen, eventuell semantischen Charakters.) Man pflegt die Gesellschaftswissenschaften im Vergleich zur Naturwissenschaft für eine eigenartige Wissenschaft zu nennen, hauptsächlich ihrer niedrigen Genauigkeit, ihrer wissenschaftssprachlich-formalisierten und ihrer verifizierbar-prädiktiven Eigenschaften halber. Aufgrund dieser Faktoren wird behauptet, daß die Gesellschaftswissenschaften im Anfangsstadium ihrer Entwicklung stehen. Der „Anfangsstadium" zeigt an, daß die Zeit der Wissenschaftsentwicklung nicht mit „absoluter Zeit" gemessen werden kann, sie ist die Funktion der jeweiligen gesellschaftlichen Entwicklung. Während die herrschenden gesellschaftlichen Interessen, bei einer gegebenen wirtschaftlichen Entwicklung, die naturwissenschaftliche Erkenntnis beanspruchten, widersetzten sie sich der gesellschaftswissenschaftlichen Erkenntnis. „Nicht nur darauf kommt es an, ein wie großes Erkenntnismaterial und dadurch bestimmt, wie tiefgreifende Fragestellungen eine Gesellschaft der Wissenschaft und der Philosophie darbietet, sondern auch darauf, wieweit sie imstande ist, jene Verallgemeinerungen, jene Wahrheiten, die aus diesem jeweiligen Stoffgebiet wissenschaftlich gewonnen werden können, ideologisch zu ertragen." (LUKÁCS, I. 162) Nun kann aber die Rechtswissenschaft gesellschaftlich unerträglich werden, wenn sie die Wirklichkeit der Gesellschaftsverhältnisse ermittelt und enthüllt. Nicht nur deshalb, weil die gesellschaftlichen Wirklichkeiten die herrschende Ideologie kränken würden, sondern weil die Rechtspflege mit diesen Mitteln nicht funktionieren kann und weil sie mit den durch rechtliche Mittel durchführte Gesellschaftslenkung in Widerspruch steht.

Aufgrund der obigen mutet es bestimmt nicht übertrieben an, wenn die Entwicklungsfähigkeit der Rechtswissenschaft zumindest widersprüchig bezeichnet wird. Es kann eingewendet werden, daß dieser Widerspruch eben dadurch entsteht, daß die präwissenschaftlichen Vorstellungen die eng wissenschaftlichen, verläßlichen Kenntnisse überdecken. Wenn das der Fall ist, und wenn die Rechtswissenschaft auf ihrem Weg in Richtung Gesellschaftswissenschaft weitertreten kann, dann kann ihrer Zukunft doch mit Zuversicht entgegengesehen werden. Der Favorit der Wissenschaftlichkeit wäre am besten die Rechtssoziologie, oder die nach ihrem Muster und nach ihrem Geist kultivierten Rechtszweigtheorien; doch es stellt sich die Frage, ob es nicht mehr ist als ein Spiel der Entwicklung, daß die Rechtswissenschaft die Rechtssoziologie aus ihrem Kommunikationssystem aussperrt und zur Sammelkiste ihrer Schildphrasen macht. In der momentanen Lage werden die normativen Elemente der Rechtswissenschaft oft nur äußerlich und das theoretische Niveau mit ihrer Kritik bloß Fallweise korrigierend ergänzt, im Zeichen der gesellschaftlichen Anschauung. Und auch das kann kaum als eine Folge der inneren Entwicklung aufgefaßt werden; es ist eher eines Versöhnlertum an den Zeitgeist, an die Entwicklungen außerhalb der Rechtswissenschaft. An sich ist das natürlich kein Fehler, entwickelt sich doch das Gesamtsystem der Wissenschaften gleichartig derweise, daß es jederzeit ein hervorragendes Gebiet gibt, das ein methodisches Beispiel für die anderen darstellt. Es steht fest, daß im Falle der — unseres Erachtens leider unumgänglich isolierten — Konsideration der Gesellschaftlichkeit die Rechtswissenschaft der willkürlichen Begriffsbildung los werden kann. Diese wertvollen, erfreulichen und weiterzustärkenden Elemente ergeben aber keine neue Rechtswissenschaft, sie sind bloß Mittel der Anpassungsbestrebungen der Rechtswissenschaft (und ihres Publikums), durch welche sie sich einzufügen trachten in eine neue, veränderte gesellschaftliche und geistige Umgebung.

Aus unseren Darlegungen ergibt sich ein eigenartiger Widerspruch. Einerseits stellten wir in Zweifel, daß die Rechtswissenschaft, angesichts ihrer gelieferten oder lieferbaren Kenntnisse, wirklich eine Wissenschaft ist, andererseits aber setzten wir voraus, daß das Recht wissenschaftlich erkennbar ist, ja wir behaupten sogar, daß Umrisse der mit dem Recht im Zusammenhang stehenden objektiven Systeme entstehen, organisiert durch eine Hypothese, die den Weg zur Vollentfaltung der Kenntnisse frei gibt.

Warum sprechen wir von dieser Rechtswissenschaft bloß als von einer Möglichkeit? In unserem engeren Fach treffen wir doch Schritt Hinweise, denen Glauben schenkend wir über die Festigung der gesellschaftlichen Anschauung berichten müßten. „So oft wir aber die Wörter ‚Recht', ‚Politik', ‚Wirtschaftsleben' usw. miteinander verbinden, kommt es nie so weit, daß diese von ‚Wissenschaftlern' übernommen werden, die sich mit der Deklinierung und Koppelung der verschiedenen Wörter befassen." Mag es noch so überraschend anmuten, dieses Zitat stammt von dem meist charakteristischen Vertreter des sozialistischen Normativismus (WISCHINSKIJ, 31). Diese nutzlose Wortfügung ergibt sich daraus, daß die Rechtswissenschaft

ihre gesellschaftliche Funktion gerade als Wirklichkeitreduktion erfüllen kann. Das Recht erfüllt ihre gesellschaftliche Aufgabe, die Beilegung der sich im Leben ergebenden theoretischen und praktischen Strittigkeiten, die Regelung der Lebensverhältnisse in breiterem Sinn und ihre Umformung im Sinne der erwünschten Regelmäßigkeit im Grunde nicht auf wissenschaftlicher Basis, auch wenn sie in bedeutendem Maß desanthropomorphisiert, das sich aus der zur Regelung der einzelnen Teilmomente notwendigen Instrumentalisation ergibt. Das gilt sowohl für die Rechtsschaffungs-Rechtswissenschaft, als auch für die Rechtsanwendungs-Rechtswissenschaft, die sich ja übrigens nicht nur praktisch, sondern schon wegen dem Zusammenhang der Rechtsschaffung und der Rechtsanwendung prinzipiell nicht scharf trennen. Es ist praktisch variabel inwieweit eine jurisprudentielle Theorie *de lege lata* oder *de lege ferenda* Thesen enthält. Unter anderen hängt das von dem Maß der erwünschten oder notwendigen Rechtsveränderung und von der gesamten Dynamik des Rechtssystems ab. Die deutsche Pandektistik funktionierte aus dem Gesichtspunkt des BGB als Rechtsschaffungstheorie. In der Blütezeit des Naturrechts dagegen, beziehungsweise seit dem Ende des XIX. Jahrhunderts sondert sich im allgemeinen „die Wissenschaft der Rechtsschaffung" ab. Gemäß Julius PIKLER entspricht nur dei Rechtsschaffungswissenschaft den strengen Erfordernissen der Wissenschaft. Auch heute ist es häufig, daß die Rechtswissenschaft als Rechtsschaffungswissenschaft angesehen wird; bei dieser Gelegenheit werden die jurisprudentiellen Theorien und Tätigkeiten aus der Rechtswissenschaft ausgeschieden. Der Grund dieses Standpunktes ist, daß es sich hier Gelegenheit bietet der Norm los zu werden und, mit Hinsicht auf die Rechtsschaffung, kann hier eine gesellschaftswissenschaftliche Erkenntnis entstehen. Neuestens entstand anhand der wissenschaftlichen Begründung der Rechtsschaffung in der Sowjetunion der Gedanke einer selbständigen Rechtsschaffungswissenschaft (POLENJINA).

3.1. Rechtsanwendungs-Rechtswissenschaft

Die innere Schranke eines wissenschaftlichen Systems der Rechtsanwendung besteht darin, daß die auftauchenden gesellschaftlichen Probleme ebendeshalb rechtlich gelöst werden müssen, weil es gesellschaftlich nicht erwünscht ist — und angesichts der objektiven Entwicklung der Wissenschaften warscheinlich auch nicht möglich wäre — diese wissenschaftlich zu lösen. Die wissenschaftliche Lösung wäre hier die systematische und konsequente Anwendung der wissenschaftlichen Kenntnisse, das heißt die Regelung der strittigen Situationen durch Anwendung der gesellschaftlichen Gesetzmäßigkeiten der gegebenen Situation. Das mag ziemlich metaphysisch klingen, und das ist auch kein Zufall, da die rechtlich zu regelnden Probleme charakteristischerweise alltägliche Probleme sind. Prinzipiell wäre das kein Hindernis, bei einer wissenschaftlichen Handhabung würde sich höchstens das Leben desanthropomorphisieren. Solche Wirkungen der Naturwissenschaften werden im

alltäglichen Leben zweifellos geltend. Es wäre ein System denkbar, wo bei der Beilegung eines Streites die im vorhinein berechenbaren Wirkungen der Entscheidungen auf das Seelenleben der Berührten optimalisiert werden, die Verantwortung wäre durch die sich auf die Gestaltung der Psyche des Täters beziehenden wissenschaftlichen Gesichtspunkte bemessen, oder es gelänge irgendeine soziologische oder volkswirtschaftswissenschaftliche Theorie zur Anwendung, der Rechtsstreit würde zum Beispiel in einer die gesellschaftlichen Gesetze unmittelbar geltendmachenden Weise entschieden. Wenn beispielsweise gemäß der statistisch geltenden Regel 18% der im 28. Lebensjahr geschlossenen Ehen aufgelöst werden, dann würde in einem gegebenen Prozeß die Scheidung nur dann ausgesprochen werden, wenn der gegebene Fall in dem gesellschaftsgesetzlich geltenden „Rahmen" Platz hat. Das System kann durch normative Überlegungen noch weiter verfeinert werden. Es kann zum Beispiel deklariert werden, daß die gesellschaftliche Anomie über ein bestimmtes prozentuelles Vorkommen einer Devianz beginnt, oder daß ein Wirtschaftsrechtsstreit derweise gelöst werden muß, daß die durch den Beschluß zustandekommende wirtschaftliche Lage Marktgleichgewicht erwirkt, oder daß sie in einer gesellschaftlichen input-output Matrix einem beliebigen Wert oder Gleichgewicht entspricht. Die Beispiele könnten beliebig vermehrt, ja sogar aus der Rechtsgeschichte ergänzt werden. Der Scheidung wurde zum Beispiel zu einer bestimmten Zeit durch das Gericht und durch die Rechtswissenschaft deshalb Hindernisse gestellt weil die zahlreichen Scheidungen, laut der normativen Anschauungsweise, zur gesellschaftlichen Desorganisation führen würden. Jene Regelungsversuche, die bestrebt waren derartige wissenschaftliche Überlegungen in das Recht einzuführen — zum Teil mittels rechtswissenschaftlicher Vermittlung (und daß es nur zum Teil der Fall war, das ist bei weitem kein Zufall), — zeigen, wie das Bestreben des Rechts zur Wissenschaft zu machen, d. h. ihre Desanthropomorphisierung, die Rechtsstruktur auflöst. Diese Bestrebungen jedoch werden, soweit es heute beurteilt werden kann, nicht allgemein, und zwar nicht nur wegen dem Ungenüge der Wissenschaft, sondern vor allem als Folge der Struktur der Gesellschaft, als Folge von Gewaltinteressen. (Es ist wieder eine andere Sache, daß auch diese gewaltbedingten Überlegungen dem Schein nach wissenschaftlicher Formen bedürften und nehmen auf gewisse instrumentalen Zusammenhänge Rücksicht.) Das Recht und die dem Recht entsprechende gesellschaftliche Verhältnisregelung sind grundlegend die Geltungsformen bestimmter Gewalt- und Interessenstrukturen, was im Falle einer „wissenschaftlichen" Regelung undenkbar ist. Die gegebenen rechtlichen Strukturen aber sichern als entsprechende Ideologie (zum Beispiel das Recht als Gerechtigkeit), durch die seitens der Rechtswissenschaft gewährten Ideologie ergänzt, die Regelung nach Interessenbereiche. Ein derartiges praktisches System als Ideologie unterstützendes und antreibendes, zum Teil darin eingebautes System kann letzten Endes nicht zur Wissenschaft werden. Wie es Marx behauptet: „Der religiöse Widerschein der wirklichen Welt kann überhaupt nur verschwinden, sobald die Verhältnisse des praktischen Werktagslebens den Menschen tagtäglich durchsichtig vernünftige Beziehungen zueinander und zur Natur darstellen.

Die Gestalt des gesellschaftlichen Lebensprozesses, d.h. des materiellen Produktionsprozesses streift nur ihren mystischen Nebelschleier ab, sobald sie als Produkt frei vergesellschafteter Menschen unter deren bewußter planmäßiger Kontrolle steht. Dazu ist jedoch eine materielle Grundlage der Gesellschaft erheischt, oder eine Reihe materieller Existenzbedingungen..." (MARX, 1947, I. 85).

Die mit der Rechtsanwendung verbundenen wissenschaftlichen Tätigkeiten stehen im Dienste des den Klasseninteressen entsprechend funktionierenden Rechts, das bedeutet aber nicht, daß die derweise zustandegekommenen Theorien ihr Niveau und ihren Inhalt betrachtet, sich davon nicht beträchtlich loslassen könnten. Die Rechtswissenschaft kann zwar (aus funktionalen Gründen und infolge ihrer Mangelhaftigkeiten) das Recht nicht verwissenschaften, sie kann sie aber in bedeutendem Maß rationalisieren. Die Rationalität ist aber ziemlich stark an Zeit und Seinsphären gebunden, daher ist die in die eigene Struktur der Rechtswissenschaft eingebaute, beziehungsweise die seitens der Rechtswissenschaft vermittelte Rationalität gesellschaftlich von wechselnder Bedeutung und vertritt ihre spezielle rechtliche Rationalität nur in beschränktem Maß. Am nächsten gelangte dazu die deutsche Rechtswissenschaft des 19. Jahrhunderts, die mit Begriffen speziell rechtlicher Bedeutung (Geltung) gearbeitet hatte, die es ermöglicht hatten den Begriffen Rechnung zu tragen, was — wenigstens in der Auffassung ihrer Pfleger — dieser Tätigkeit wissenschaftlichen Charakter verlieh. Später erwiesen sich aber diese beschränkten Verfahren nicht nur zur Betreibung einer Wissenschaft, sondern auch zur Bedienung des Rechts für ungenügend. An der für fest geltenden Mauer der Dogmatik entstanden zahlreiche Nischen, durch welche modernere gesellschaftliche und wirtschaftliche Rationalität einsickern konnte. Dieser Vorgang war mit der in der Lage des Rechtsanwenders eingetretenen Änderung in engem Zusammenhang. Die größere Freiheit des Gesetzgebers basierte nur zum Teil auf gesetzlicher Ermächtigung, und ein großer Teil der Ermächtigungen wurde nur nachträglich durch die Praxis sanktioniert. Die Aufgabe der Rechtswissenschaft wäre prinzipiell die Vermittlung der neuartigen Rationalität gewesen. Es steigerte sich tatsächlich das Interesse hinsichtlich der wissenschaftlichen Analyse der Seele oder der Interessen und deren rechtswissenschaftlichen Nutzbarmachung, bis diese dann endlich zu frei berücksichtigten Kategorien wurden. Nur haben diese „freien Bahnen" weder die Wissenschaftlichkeit der Rechtswissenschaft, noch die des Rechts gesteigert, weil statt einer begrifflichen Adaptation eher eine formelle Übernahme und inhaltliche Fälschung vor sich ging. Die Theorien, die im Zusammenhang mit diesen, zum Teil der Rechtsanwendung vorangehend, zum Teil deren Ergebnisse übernehmend, durch die Rechtswissenschaft ausgearbeitet wurden, befriedigten größtenteils irgendwelche neue gewaltliche, wirtschaftliche oder politische Interessen. Als zum Beispiel das Ungarische staatliche Arbitrage in seiner Urteilspraxis die Planmäßigkeit nach seiner Art fördern wollte, hat die bezügliche Jurisprudenz nicht die Möglichkeiten der planmäßigen wirtschaftlichen Entwicklung wissenschaftlich analysiert, sondern legitimierte nur die fallweisen Entscheidungen mit zeitmäßiger oder eher aktueller Phraseologie.

Die partikulär geltend gemachte Wissenschaftlichkeit steigert nicht die Wissenschaftlichkeit der Rechtswissenschaft. Die Berufung auf die Interessen führte in bedeutendem Teil der Fälle nicht zur wissenschaftlichen Analyse der gesellschaftlichen Gesichtspunkte, sondern zur unverhalten Geltendmachung der dominanten Machtinteressen (oder des für Interesse erachteten Willens), beziehungsweise zum akzeptablen Ausdruck einer Reihe von unklaren Wertüberlegungen und organisatorischen Aspekten usw. Es ist kein Zufall, daß in der Rechtswissenschaft der BRD die wertorientierte Jurisprudenz ebenso verbreitet ist, wie die Interessenjurisprudenz. In den Händen des Juristen entwertete sich die Soziologie. (Anstelle der Soziologie kann jede beliebige Wissenschaft gesetzt werden.)

Daraus folgt aber nicht, daß in der Gesellschaft keine Interessen geben würden, die in gewissen Fällen eine den jeweiligen Möglichkeiten entsprechende wissenschaftliche Objektivität in der Entscheidung beanspruchen würden. Es gibt Auffassungen, die meinen, daß der Richter fähig und geeignet ist, den gesellschaftlichen Konsequenzen seiner Entscheidung wissenschaftlich begründet Rechnung zu tragen. Es muß wiederholt darauf hingewiesen werden, daß die Gestattung einer derartigen Rechnungstragung von den Interessen der Gewalt abhängt. Zahlreiche Gegeninteressen und institutionelle Innervationen verstellen den Weg, daß der Richter seine Entscheidungen wissenschaftlich begründet faßt, unter anderen zum Beispiel der Mangel an entsprechenden Fachleuten. Die heutige Juristenbildung und die einen Teil des gegenwärtigen Bildungsmaterials darstellende Rechtswissenschaft wäre kaum dazu fähig, diese „Fähigkeit der Beachtung der gesellschaftlichen Folgen" zu bieten. Es ist charakteristisch, daß die Rechtssoziologie, die — wenn auch nicht die volle wissenschaftliche Anschauung — aber zumindest eine Art Selbstkritik der Rechtsanwendungs- (Rechtsentwicklungs-) Tätigkeit gewähren könnte, bloß Ende der 60er Jahre ihren Einzug in die Universitäten hielt, wo es heute noch ziemlich drittrangig behandelt wird und nicht fähig ist auf die zweiglichen Rechtswissenschaften und noch weniger auf die Praxis Wirkung auszuüben. (TREVES-FERRARI)

Ja ist es denn in der Rechtswissenschaft überhaupt der den gesellschaftlichen Anforderungen Rechnung tragende Rechtsanwender das so sehr ersehnte lichtbringende Kind (das Kind der Gesellschaftswissenschaftlichkeit)? Die Vertreter der Freirechtslehre wiesen bereits zur Jahrhundertwende nach daß der Rechtsanwender mit den Folgen seiner Entscheidung rechnet, damit nämlich, wie sich das auf die Parteien auswirkt; sie waren sogar der Meinung, daß der Richter zu den derartig vorkalkulierten Folgen die rechtliche Begründung nachträglich sucht. Heutzutage geht es aber um gesellschaftliche Folgen, was z. B. von den Gerichtshöfen der Bundesrepublik Deutschland auch gerne erwähnt wird, aber die Begründungen entsprechen meistens nicht einmal den minimalen Erfordernissen der folgerichtigen Analyse. In Ungarn wird die Beurteilung der Pseudofolgen von den Gerichten zum größten Teil den rechtspolitischen Rechtsprinzipien überlassen.

Aufgrund der obigen bin ich dessen nicht ganz sicher, ob dieses „Kind" lebensfähig oder gar „lichtbringend" wäre. Die ganze Struktur des Rechts zielt doch

auf sozial Komplexitätsreduktion, auf die Erleichterung der Entscheidungslast, auf die Abwehr der Verantwortung für die Entscheidung ab. Die Folgenermessung kann aber kaum zur angewandten Wissenschaft gemacht werden, nicht einmal zur angewandten Rationalität (Praxeologie). PIKLER's (2) vormalige skeptische Bemerkung macht uns aufmerksam: die Jurisprudenz befaßt sich nicht mit Gründen und Folgen, der Richter ist in der Anwendung blind, die Kenntnis des Grundes würde ihr nur stören und zu Rechtsunsicherheit führen.

Ungeachtet dessen, ob die Beachtung der gesetzlichen Folgen von Seite des Rechtsanwenders stärker wird oder nicht, hat die Rechtswissenschaft wichtige Aufgaben zu lösen, nicht aber im Interesse der Konsequenzen, sondern im Interesse der zur Entscheidung nötigen Vereinfachung. Das ist nicht zu umgehen, sonst wird das zu der immer komplexer werdenden Gesellschaft sich mit gesteigerter innerer Komplexheit fügende Recht unmanipulierbar. Die Rechtswissenschaft kann diese Aufgabe nur durch Rationalisierung ihrer eigenen Struktur durchführen, und zwar derweise, daß sie ihre „blinde" Entscheidung fällende Tätigkeit praktisch stärker rationalisiert, beziehungsweise für die zur Beeinflußung der rechtsanwendenden Vernunft berufene institutionelle Ordnung derartige Modelle bietet. Ähnliche Rationalisierungen lieferte die Rechtswissenschaft auch bisher, nämlich durch die Dogmatik. Die Aufgabe der Rechtswissenschaft kann in dieser Beziehung die Rationalisierung der Dogmatik sein, — im Zeichen der größeren „Wissenschaftlichkeit". KRAWIETZ (1972, 33.) behauptet, daß zur Erneuerung der rechtlichen Dogmatik nur die Anerkennung der die Normen zustandebringenden und diese erläuternden Interessen als juristisches Problem führen kann. Dazu bedarf es aber einer die Dogmatik behandelnden besonderen Theorie. Diese Metatheorie der Dogmatik ist eigentlich eine seit der Jahrhundertwende bestehende Forderung, die im Laufe der Zeit in vieler Hinsicht in Erfüllung ging. Heute geht die Explizitmachung dieser Metatheorie vor sich; wenn das Erfolge zeitigen wurde, könnte sich die Dogmatik in eine zeitgemäße Soziotechnik umformen. Da aber die dazu notwendige theoretische Arbeit die Leistungsfähigkeit der zweiglichen Rechtswissenschaften übertrifft, und zum Teil eine „äußere" Anschauung erfordert, ist es verständlich, daß die Aufgabe erwartungsgemäß nur durch die rechtslehreartige Rechtstheorie gelöst werden kann.

Falls die Konsequenzanschauung stärker wird, muß auch diesbezüglich die zur Handhabung nötige Vereinfachung in der Dogmatik durchgeführt werden. Das würde die Rechtstheorie unmittelbar berühren: sie selbst würde gesellschaftswissenschaftlicher werden, wenn es der Dogmatik überlassen wäre zu bestimmen, auf welchen effektiven Bereich der Berührten sich die Inachtnahme der gesellschaftlichen Interessen in der Festlegung der Konsequenzen der Entscheidung ausdehnt und wie die Interessen der Berührten rational, eventuell quantitativ ausgedrückt werden kann. In diesem Fall müßte sich nämlich die durch die Rechtstheorie zu gewährende methodologische Rationalisierung auch auf die Rationalisierung der Interessen ausbreiten. Daraus folgt aber nicht, daß auf diesem Punkt die Feststellungen anderer Wissenschaftszweige angewandt werden müßten, und überhaupt, daß die Dogmatisie-

rung der Konsequenz durch sie selbst durchzuführen wäre. All das ist nur die methodologische, rationalisierende Begründung der rechtlichen Vereinfachung der Dogmatik.

Unserer Meinung nach werden — angesichts der obigen — die formellen Erfordernisse der wissenschaftlichen Theoriebildung in den Rechtstheorien in gesteigertem Maß geltend werden. Diese Tendenz wird dadurch gesteigert, daß in der Rechtssetzungswissenschaft, wie wir sehen werden, ähnliche Bedürfnisse wahrnehmbar sind. Es ist auch aus wissenschaftstheoretischem Gesichtspunkt wünschenswert, daß die Rechtswissenschaft, soweit es möglich, zur Soziotechnik entwickelt wird, da ja die Jurisprudenz als *techné,* zum Teil eben ihren wissenschaftlichen Ambitionen zum Opfer fallend, ihrer Möglichkeiten und der ihr gegenüber gestellten gesellschaftlichen Anforderungen nicht gerecht wird. Die soziotechnische Rationalisierung ist natürlicherweise auch in rechtlicher Beziehung breiter als die Wissenschaft. (ALBERT, 110.)

„(Ein wahrhaft wissenschaftliches Erfassen der objektiven Wirklichkeit nur durch einen radikalen Bruch mit der personifizierenden, anthropomorphisierenden Anschauungsweise möglich ist. Die wissenschaftliche Art der Widerspiegelung der Wirklichkeit ist ein Desanthropomorphisieren, sowohl des Objekts wie des Subjekts der Erkenntnis. Des Objekts, indem sein An-sich von allen Zutaten des Anthropomorphismus nach Möglichkeit gereinigt wird; des Subjekts, indem es sein Verhalten zur Wirklichkeit darauf einstellt, die eigenen Anschauungen, Vorstellungen, Begriffsbildungen ununterbrochen darauf zu kontrollieren, wo und wie anthropomorphisierende Entstellungen der Objektivität in die Aufnahme der Wirklichkeit eindringen können. (LUKÁCS, I. 145—146.)"

Insofern diese Rationalisierung die Begründung der Verfahrensvorgänge berührt — das angesichts der mit der Erneuerung der Dogmatik und der gesellschaftlichen Kontrolle der dogmatischen Gesichtspunkte, beziehungsweise der dogmatischen Kontrolle der gesellschaftlichen Gesichtspunkte zusammenhängenden Bestrebungen der Gegenwart durchaus vorstellbar ist —, kann die Erneuerung mit der die *„policies"* geltend machenden effektiven Verwaltungspraxis Hand in Hand gehen. Die Behörden können nämlich — im Gegensatz zu den zentralen instrumentalen Überlegungen — in ihren Entscheidungen nicht bis zum Ausgangspunkt der übergestellten Organe zurückgreifen, d. h. sie sind nicht fähig die durch die zentrale Rationalität oft für wünschenswert deklarierte radikale „Wurzelmethode" anzuwenden, sondern ändern an der gegebenen Situation allmählich, Schritt für Schritt. Dementsprechend ist die Entscheidung das Ergebnis einer Wahl zwischen der bestehenden Situation und ihrer geringfügigen Variationen, und die Behörden lassen sich nicht auf die Vergleichung der Kombinationen und der Zahlenmäßigkeiten der Ziele und Werte und der denselben dienenden Mittel ein, was die zentrale instrumentale Rationalismus inspiriert. Diese Methode beschränkt natürlich die Invention bedeutend und verhindert die Innovation. Eine derartige Verbesserung der Dogmatik entspricht den Anforderungen der Formalisierung und Kontrollierbarmachung der „aufeinander

folgenden beschränkten Vergleichungen" (LINDBLOM, 125), obzwar gemäß LUHMANN (1974, 48). „Das Auftauchen von folgenorientierten Scheinkriterien außerjuristischer Provenienz ... ist ein weiteres Alarmzeichen ersten Ranges."

Wenn einmal das Recht als Sicherung der Freiheit gegen die Desanthropomorphisierung, oder zumindest gegen die seinen eigenen Bereich überschreitenden entfremdenden Wirkung Schutz bietet, mutet es als Widerspruch an, die sich auf das Recht auswirkende Rechtswissenschaft als Desanthropomorphisierensbestrebung zu rechtfertigen. Da handelt es sich aber um zwei verschiedene Probleme: eines des Rechts, und ein anderes der Rechtswissenschaft. Die zur Soziotechnik nötige Desanthropomorphisierung sichert nämlich bloß die Möglichkeit zur Handhabung des Rechts. Durch ihre eigene Rationalisierung verbessert die Rechtswissenschaft die Handhabungsmöglichkeit des Rechts, wodurch wiederum die gesellschaftlich so wichtige Berechenbarkeit gefördert wird.

Es darf aber nicht vergessen werden, daß die Rechtswissenschaft den Rationalitätsansprüchen der Wissenschaftstheorie prinzipiell in mehrfacher Art entsprechen kann, und es besteht die Gefahr, daß die für die Juristen eine Handhabungsmöglichkeit bietende Soziotechnik das Recht von dem alltäglichen Leben noch weiter rückt, als es gegenwärtig ist. Mit anderen Worten, wie das bei den Werken der instrumentalen Vernunft so oft der Fall ist, wird nur die Entfremdung größer. Die Vernunft ist instrumental, wenn die Abstimmung des Subjekts und des Objekts falsch ist; Die Vernunft ist hier ein Mittel zur Erreichung des Ziels, wo der Wert des Ziels kein Beurteilungsmittel gewährt. (ADORNO, 1970, 12.) Die Gefahr soll nicht überwertet werden, da einer immer größeren Anteil der Rechtsanwender — „glücklicherweise" — keine Juristen sind, über die Fachgriffe der Handhabung des Rechts nicht verfügen und ihre Ansprüche, die nicht ohne Acht bleiben dürfen, sich gegen die für das alltägliche Bewußtsein unzugängliche rechtstechnische Rationalität auswirken. Am wahrscheinlichsten ist, daß sich das Rechtssystem zerspalten wird: es kommt ein traditioneller, in seiner Logik von dem alltäglichen Bewußtsein abweichender „juristischer Teil", und daneben ein instrumentales Rechtsmaterial mit amorpher Konstruktion zustande, der sich methodisch an die alltägliche analytische Denkart anpaßt und auch sonstige fachwissenschaftliche (ärztliche, psychiatrische, technische) Kenntnisse umschließt. Aus gesellschaftlichem Gesichtspunkt wird gewiß die Wirkung des juristischen Teils geringer sein.

3.2. Die Wissenschaft der Rechtsschöpfung

Bezüglich der rechtswissenschaftlichen Tätigkeit im Zusammenhang mit der Rechtsschöpfung können wir mit gewissen Ergänzungen dasselbe sagen, daß wir im Zusammenhang mit der Wissenschaft der Rechtsanwendung gesagt haben, da doch die Rechtsschöpfung aus dem Gesichtspunkt der gesellschaftlichen Funktion (in der gesellschaftlichen Endleistung) kein Unterschied aufweist und für die Rechtsanwen-

dung gelten die durch die Rechtsgestaltung vorgeschriebenen Regeln. Es ist also gar nicht verwunderlich, wenn wir diese Regeln wissenschaftlich für indifferent erklären. Und wie die Rechtsanwendung die zum Teil bereits rechtlich verankerten Interessen nachgeben muß, so ist auch die Gesetzgebung den gesellschaftlichen Interessen unterworfen. Da aber bei der Gesetzgebung der Glauben entstand, daß hier „die Bahn frei sei", daß die Tätigkeit nur den Normen der Rationalität unterliege, wurde — mit Montesquieu beginnend wenigstens — die Wissenschaftlichkeit auf diesem Gebiet allgemein erwartet.

Die Regelungsvorschläge der Rechtswissenschaftler und deren Begründungen bedienen sich in Wirklichkeit zu jeder Zeit des geltenden rechtswissenschaftlichen Argumentationssystems: die Naturrechtsgelehrten leiteten die rechtliche Lösung aus der Natur, später aus der Vernunft ab; das Juristenrecht des 19. Jahrhunderts wandte sich an die Pseudoanalyse der geschichtlichen Quellen, während die wissenschaftliche Vorbereitung der modernen Regelung auf die gesellschaftlichen Verhältnisse konzentrierte. Da aber die Rechtsnormen in politischem Vorgang geschaffen werden, erscheinen im Argumentationssystem die politischen und moralischen Berufungen und in den Debatten der tatsächlichen Gesetzgeber werden ausdrücklich diese — und nicht die wissenschaftlichen Legitimationen — vorherrschend.

Wenn wir bloß bei der Wissenschaft der Gesetzgebung der Gegenwart bleiben, taucht die Frage auf, inwieweit die gesellschaftlichen Probleme und die wissenschaftliche Analyse derselben rechtswissenschaftliche Probleme darstellen. Bei der Rechtswissenschaft richtet sich die Antwort auf diese Frage grundlegend nach den bestehenden normativen Gesichtspunkten: die rechtswissenschaftliche Analyse und die Lösung wird in entscheidendem Maß dadurch beeinflußt, daß das Problem in dem Begriffs- und Anschauungssystem untersucht wird, die durch die gegenwärtig bestehende Regelung bestimmt ist. Daß ein Problem seine eigenen Anschauungsschranken mit sich führt, ist eine Eigenart, mit der man rechnen muß, — und mit der sich die fachgesellschaftswissenschaftliche Analyse gewöhnlich nicht befaßt. Demzufolge wird die Lösung des Problems im Grunde die Reproduktion des bereits Bestehenden. Im Zuge der Rechtsgestaltung erblickt die Rechtswissenschaft ihre Hauptaufgabe darin, daß sie die Begriffs- und Formstrukturen bestimmt, mit der die Lösung harmonisieren muß, das heißt: dadurch wird die als Lösung geltende Rechtsnorm durch die bereits gegebenen Rechtsquellen-, rechtssprachlichen und rechtslogischen Eigenartigkeiten determiniert.

In krassem Widerspruch zu den obigen können wir auch sagen, daß eine gesetzgeberische Rechtswissenschaft überhaupt nicht existiert, insofern es allgemeine Theorien in diesem Zusammenhang gegenwärtig überhaupt nicht darbietet, abgerechnet die allgemeinen Rechtsschaffungstheorien der Rechtswissenschaft, die aber bloß darüber reden, wer das Gesetz verabschiedet. Das ist aber aus wissenschaftlichen Gesichtspunkt eine ziemlich eingeengte Annäherung und für den Gesetzgeber darüber hinaus auch noch völlig uninteressant, da er es dessen wohl bewußt ist, daß im Moment er es ist, der das Gesetz schafft. In Hinsicht auf die rechtliche Objektivation

beziehungsweise ihrer Teilsysteme gibt es freilich auch heute zerstreute Thesen, für Weiterentwicklung geeignete Theorieteile, diese können aber seitens der Rechtswissenschaft kaum nutzbar gemacht werden. Aber eine die *Rechtschaffung fördernde* wissenschaftliche Theorie könnte prinzipiell ausgearbeitet werden. Diese Bemerkung soll streng als Hypothese aufgefaßt werden, denn es ist kaum ein Zufall, daß die wissenschaftlichen Theorien der Gesetzgebung größtenteils darin bestehen, jene empirisch kaum zu bestätigende These zu legitimieren, daß die Rechtsnormen durch ihr Zustandekommen den Volkswillen oder einen sonstigen Wert representieren.

Die heutigen instrumentalen Gesichtspunkte der Gesetzgeber, die die Wissenschaftlichkeit der Gesetzgebung so sehr unterstreichen, daß wir beinahe schon geneigt sind, der Wissenschaftlichkeit Glauben zu schenken, sichern in Wirklichkeit nicht automatisch, daß die rechtswissenschaftlichen Theorien wissenschaftlich werden. Der Verwissenschaftlichung werden gerade durch das Rechtsgestaltungsinteresse Grenzen geboten. Es ist unzweifelhaft, daß in dieser Beziehung der „wissenschaftlichste" Teil der Rechtswissenschaft entstehen könnte, wenn die zur Neuregelung notwendige Klarsicht zur Geltung käme; aber auch das wäre eine bloß soziotechnische Tendenz. Die hierher gehörenden Theorien könnten taxonomisch die strukturell-formellen Bewegungseigenheiten der rechtlichen Objektivation bestimmen, und der so erarbeitete Instrumentenvorrat könnte durch die Gesetzgebung zur Einführung von durch andere Wissenschaften vorgeschlagenen inhaltlichen Lösungen verwendet werden. Diese attraktive Lösung ist aber vermutlicherweise irreal; es ist unwahrscheinlich, daß ein derartiges Zusammenheften der Form und des Inhalts ertragreich wäre. Die reinen Formlehren erweisen sich — nach Kelsens Beispiel geurteilt — nicht für befriedegend. Auch diese Rechtswissenschaft könnte nicht über ihren eigenen Schatten treten: ihre induktive Grundlage ist bloß in den gegebenen rechtlichen Formen zu finden, demzufolge ist die durch die Änderung des Inhalts geforderte qualitative Entwicklung ausgeschlossen. Eine These derartigen Charakters, wie zum Beispiel die der Bewegung vom Status zum Kontrakt — vorausgesetzt hier und diesmal deren Akzeptibilität — wird nur dann anwendbar (operabel) sein, wenn sie in die Totalität versetzt würde; dann würde es sich herausstellen, wo die gegebene Epoche und das gegebene Problem tatsachlich ihrem Platz hat, und was im Sinne der erwähnten These die geeignetste Regelungsart sei. Diese Totalitätsanschauung sprengt aber die Rahmen der Gesetzgebungswissenschaft, da sich die Totalitätsanschauung, gegenüber der bestehenden Rechtsordnung, wenn auch nicht unbedingt gesellschaftlich, jedoch aus dem Gesichtspunkt des Publikums der Rechtswissenschaft sicherlich respektloser benimmt, als es ideologisch ertragbar ist.

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Es ist zweifellos, daß die aus der gesellschaftlichen Totalität ausgehende Anschauung des Rechts, die die rechtlich-geistigen Bildungen, so auch die Rechtswissenschaft selbst kritisch untersucht, existiert. Diese kritische gesellschaftliche Totalitätsanschauung ist von den neuen linksorientierten rechtswischaftlichen Ideen

zu unterscheiden, die vor allem die geistigen Kinder von 1968 sind. In der Auffassung der Rolle des Bewußtseins besteht ein grundlegender Unterschied in den beiden Schulen trotz einer gewissen textuellen Gemeinschaft, die ohne Zweifel existiert zum Beispiel wenn Marx im Geiste des Werkes von Lukács' *Geschichte und Klassenbewußtsein* gelesen ist. Diese Wendung nach dem Bewußtsein ist notwendig, wenn sich die gesellschaftlichen Kräfte der Änderung am Horizont nicht abzeichnen, oder wenn sich der Denker mit diesen nicht solidarisch fühlt. In dem westdeutschen Positivismus-Streit wurde es offenbar, daß die Gesellschaftswissenschaft entweder als Soziotechnik behandelt wird, wobei im besten Fall eine für einen Teil der Gesellschaft, und für eine kurze Zeit geltende *(middle-range-artige)* Theorie zustande kommt, oder es wird als kritische Gesellschaftswissenschaft kultiviert. In dem letzten Fall die kritische Reflexion vermindert aber die logisch-erklärende Kraft der Theorie, die das verwirklicht (HABERMAS, 1973, 305—308).

Die kritische Anschauung übt zwar eine — nicht gerade ohne Widerspruch stehende — Wirkung auf die Rechtswissenschaft aus, kann aber mit ihr nicht identifiziert werden. Eine derartige, charakteristisch widerspruchsvolle Wirkung ist die die Gesellschaftswissenschaftlichkeit der Rechtswissenschaft anerkennende Auffassung, im Zeichen dessen die Rechtswissenschaft von Zeit zu Zeit von pseudosoziologischen Wellen überschüttet wird. Die Wirkung ist in der Tat entwaffnend. Wenn die sich an die rechtlichen Normen bindende Rechtswissenschaft eine deklarierte kritische Funktion ausübt, bleibt das, trotz jeder ihrer eventuellen wertwahrenden Funktion, grundlegend nach den Ansichten der Anhänger des status quo's kontrollierbar. Es ist zweifellos, daß auch die außerhalb der Rechtswissenschaft bleibende kritischen Bestrebung bloß innerhalb der Rahmen der Spielregeln der repressiven Toleranz existiert d. h. die Beschränktheit ihrer Wirkung ist „vorweg" präsumiert. In einem Gesellschaftssystem aber, in dem ein Bestreben besteht, daß die Mitglieder der Gesellschaft, gemäß des erwähnten Marx-Zitats über den Alltag Herr werden, und wo die Möglichkeit dieser Bestrebung material gegeben ist, dort wird die Rolle dieser Wissenschaft, und in ihr die Rolle der sich auf das Recht beziehenden wissenschaftlichen Annäherung wichtiger werden.

Und auch umgekehrt, die Existenz einer solchen Wissenschaft und ihr gesellschaftlicher *Einfluß* ist ein sicherer Maßstab zur Beurteilung der Gesellschaft.

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Юридическая наука может ли быть общественной наукой?

А. Шайо

В различных отраслях континентальных и социалистических юридических наук заимствование современных обществоведческих знаний в различной мере продвинулось вперед. Заимствование осуществилось в различных исторических условиях и, соответственно этому, в правовых отраслях сохранились требования общественных наук, господствовавшие во время заимствования. Препятствием превращения юридической науки в действительную общественную науку является и социальная функция, для выполнения которой призвана юридическая наука.

Понимание научности как изыскание закономерностей представляет трудности для образования юридических теорий. Ведь в интересах этого юристу пришлось бы быйти за пределы своей профессии же загородиться в стерильном мире юридических конструкций. С точки зрения теории науки достаточно, если имеются гипотезы с пояснительной силой и не нужно искать «сущности» правовых явлений. В юридической науке программа поиска «сущности» ограничивается, как правило, исследованием понятий.

Становление юридической науки общественной наукой имеет свои имманентные пределы (например, антропоморфизм). Зто, однако, не меняет того, что юридическию науку нужно культивировать как науку (т. е. знания развиваются интеракцией открытой научной общественности), что юристы не могли бы не продвигаться в области образования теорий.

Can the law of science become a social science?

A. Sajó

In the different branches of the continental and the socialist legal sciences the adaptation to modern social science informations happened in various pace. The interiorization took place under different historical conditions, therefore the social science expectations of the given era were embedded in the legal science branches. In the way of becoming a social science there is an obstacle for the legal science, namely the very social function, which it ought to fulfill.

The notion of scientific merit as seeking regularities makes difficult to create legal theories. This process requires that the jurist should look beyond his own profession or have to close in himself to the sterile world of legal structures. As far as scientific theory is concerned it is enough to have explanatory hypotheses and we should not seek for the „substance" of legal phenomena. In the legal sciences the program of surveying "substance" is oversimplified to searching for terms.

There are immanent obstacles of legal sciences to become social sciences (e.g. anthropomorphism). This fact does not change that the legal science must be cultivated as science i.e. the knowledge is developed by the interaction of an open public) and there is a possibility to have progress in the way of creating theories.

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Grundsätze der Strafzumessung

K. GYÖRGYI
Dozent
Eötvös Loránd Universität,
Budapest

Die Abhandlung befaßt sich mit den Fragen der gesetzlichen Regelung der Strafzumessungsgrundsätze im ungarischen Strafrecht.

Die Prinzipien der Strafzumessung wurden im ungarischen Strafrecht zuerst durch das Gesetz Nr II v. J. 1950 geregelt. Diese Regelung hat sich in der Praxis bewährt, sie wurde daher — mit kleineren Änderungen — auch in die Strafgesetzbücher 1961 und 1978 übernommen. Das System der Grundsätze der Strafzumessung besteht nach dieser Regelung aus drei wesentlichen Elementen. Das erste ist der Hinweis auf die gesetzlichen Rahmen der Strafe. Das zweite: die Berücksichtigung des Ziels der Strafe. Das dritte: die Geltendmachung der mildernden und erschwerenden Umstände, von denen das Gesetz die Gesellschaftsgefährlichkeit der Straftat und des Täters und den Grad der Schuld hervorhebt. Die gesetzliche Festsetzung der Grundsätze der Strafzumessung gewährt des gerichtlichen Ermessens einen entsprechenden Raum. Die Strafzumessung als Tätigkeit bedeutet zugleich auch Rechtsanwendung, Anwendung der gesetzlichen Grundsätze der Strafzumessung. Darauf gründet sich der Standpunkt der Judikatur, wonach die Strafzumessung die diese Grundsätze verletzt, die unrichtige Anwendung der materiellen Rechtsnorm bedeutet, die das Gericht zweiter Instanz beheben kann.

In Bezug der Strafzumessungsumstände, bemängelt die Abhandlung die im ungarischen Schrifttum sowie in der Rechtsprechung vorhandene Begriffsbestimmung, wonach diese als „Schuldumstände" genannt werden. Strafzumessungsumstand ist jeder Umstand, den das Gericht — innerhalb der gesetzlichen Rahmen — bei der Bestimmung von Art, Maß und Vollstreckungsweise der anzuwendenden Strafe berücksichtigt.

Die Abhandlung stellt nach einer Analyse dieser Umstände fest, daß die Gesellschaftsgefährlichkeit der Straftat in dieser Hinsicht von primärer Bedeutung ist. Ein Strafmaß jedoch, das der Gesellschaftsgefährlichkeit der Straftat entspricht, bedeutet kein festes Maß, sondern vielmehr einen Spielraum, in der die Strafzumessung konkret erfolgt. Die Beurteilung des Schuldgrades, der Gesellschaftsgefährlichkeit des Täters und der sonstigen erschwerenden und mildernden Umstände kann innerhalb der Rahmen durchgeführt werden, die die Gesellschaftsgefährlichkeit der Straftat bestimmt. Im Kreise der Strafzumessung stellt die Gesellschaftsgefährlichkeit der Straftat denjenigen Vergleichungspunkt dar, auf den bezogen die anderen Strafzumessungsumstände als mildernde bzw. erschwerende Umstände zu beurteilen sind.

Zur Einteilung der Strafzumessungsumstände hebt die Abhandlung hervor, daß diese Konzeption sowohl bei der Bestimmung des Bereichs dieser Umstände, wie auch für die Vermeidung der Doppelverwertung von Umständen des Tatbestandes, sogar von Strafzumessungsumständen von Bedeutung sein kann.

Unter den Umständen der Strafzumessung widmet die Abhandlung dem Begriff der Schuld und der persönlichen Gesellschaftsgefährlichkeit sowie deren Verhältnis zueinander besondere Aufmerksamkeit. Sie stellt fest, daß diese zwei Begriffe sowohl in der Theorie, wie auch in der Praxis konkurrieren. Nach dem Standpunkt der Abhandlung ist die persönliche Gesellschaftsgefährlichkeit ein Begriff der Prognose; sie weist darauf hin, was für ein Verhalten in der Zukunft vom Täter zu erwarten ist, bzw. welche Chancen die anzuwendende Sanktion zur Beeinflussung seines Verhaltens haben kann. Die Beurteilung der persönlichen Gesellschaftsgefährlichkeit kann aber nur im Rahmen erfolgen, die die schuldhaft begangene gesellschaftsgefährliche Straftat bestimmt.

1. Die gesetzliche Regelung der Grundsätze

Die Grundsätze der Strafzumessung wurden in unserem Strafrecht zuerst im Gesetz Nr II v. J. 1950 (StGB allgemeiner Teil, im weiteren = StGA) bestimmt. Diese Regelung hat sich so bewährt, daß das StGB v. J. 1961 daran nur kleine Änderungen vornahm. Die allgemeine Festlegung der Grundsätze der Strafzumessung stellt also eine Neuerung unseres sozialistischen Strafrechtes dar. Der Entwurf v. J. 1843 gab noch umfangreiche Aufzählungen der erschwerenden und mildernden Umstände. Das StGB v. J. 1878 warf demgegenüber die Spezifizierung dieser Umstände weg, und schrieb ziemlich mechanische Regeln der Strafzumessung vor: „bei der Strafzumessung hat das Gericht die den Schuldgrad beeinflussenden mildernden und erschwerenden Umstände zu beachten", und von deren Zahl oder Gewicht abhängig die gesetzliche mindeste oder schwerste Strafe anzuwenden, bzw. dieser oder jener Grenze des Strafmaßes nahezukommen.

Die Frage, welche Lösung richtiger ist, die Formulierung von allgemeinen Grundsätzen, oder die exemplifikative (oder sogar taxative) Aufführung der Strafzumessungsumstände, ist in dem internationalen Schrifttum strittig, und auch die Gesetzgebungen der verschiedenen Staaten regeln diese Frage unterschiedlich.[1]

In unserer Literatur hat nach der Befreiung SCHULTHEISZ allein eine exemplifikative Aufführung der mildernden und erschwerenden Umstände in 12 Punkten vorgeschlagen.[2] Nach dem StGA verbreitete sich die Auffassung, daß eine taxative Aufzählung der mildernden und erschwerenden Umstände unmöglich, ihre exemplifikative Aufzählung aber unnötig sei.[3] KÁDÁR schlug die Weglassung einer gesetzlichen Regelung der mildernden und erschwerenden Umstände mit der Begründung vor, daß diese zufolge der Wandlungen der gesellschaftlichen Verhältnisse ständigen Änderungen unterworfen sind; etliche treten neu auf, andere verschwinden, derselbe Umstand kann einmal mildernd, ein anderes Mal erschwerend sein, und auch die gesetzlichen Tatbestandsmerkmale können als mildernde oder erschwerende Umstände gelten, wenn sie in wesentlich erhöhtem Grade verwirklicht werden.[4] Nicht einmal während der Vorbereitung des Gesetzes Nr IV v. J. 1978 (im weiteren neues StGB) tauchte ein

[1] Zum Beschluß angenommen am Kongreß der Association Internationale de Droit Pénal, im Haag 1964 s. KÁDÁR, M.: *A súlyosító körülmények*. (Die erschwerenden Umstände) Jogtudományi Közlöny, 1965. pp. 132—141.

[2] SCHULTHEISZ, S.: *A Btk reformjára vonatkozó elgondolások*. (Ideen zur Reform des StGB) Jogtudományi Közlöny, 1949. p. 241.

[3] KÁDÁR, M.: *A büntetőtörvénykönyv általános része*. (Allgemeiner Teil des Strafgesetzbuches) *Az 1950. évi II. törvény. AZ 1950. évi 39. sz. törvényerejű rendelet*. (Gesetz II v. J. 1950. Gesetzesverordnung 39. v. J. 1950.) Budapest, Jogi- és Államigazgatási Könyv- és Folyóiratkiadó 1951. p. 140.

[4] KÁDÁR, M.: *A súlyosító körülmények*. (Die erschwerenden Umstände) p. 138.; RÁCZ, GY.: *A büntetéskiszabás elvi kérdései*. (Grundsätzliche Probleme der Strafzumessung) Magyar Jog, 1968. p. 200.; FÖLDVÁRI, J.: *A büntetés tana*. (Die Straflehre) Budapest, Közgazdasági és Jogi Könyvkiadó. 1970. p. 192.

Antrag auf, der anstatt Festlegung der Strafzumessungsgrundsätze eine andere Lösung bevorzugt hätte.[5]

Das neue StGB hat die gesetzliche Bestimmung der Strafzumessungsgrundsätze an dem früheren Recht unverändert übernommen. Diese Regelung besteht aus drei wesentlichen Elementen. Das erste: der Hinweis auf die gesetzlich bestimmten Rahmen der Strafe. Das zweite: die Berücksichtigung des Ziels der Strafe. Das dritte: die Geltendmachung der mildernden und erschwerenden Umstände, von denen das Gesetz die Gesellschaftsgefährlichkeit des Täters und den Schuldgrad hervorhebt.

Der Hinweis auf die gesetzlichen Rahmen der Strafzumessung stellt einen breiteren Begriff dar als der „Strafsatz" der für die Bezeichnung der Rahmen im besonderen Teil vorbehalten wird. Die im Gesetz verankerten Rahmen der Strafe umfassen alle im allgemeinen Teil enthaltenen Bestimmungen, die die Übertretung der unteren und oberen Grenze des Strafsatzes zulassen. Man hat also bei der Strafzumessung von dem Strafsatz auszugehen, die „im Gesetz bestimmten Rahmen" sind jedoch breiter. Diese Rahmen können ansonsten so breit sein, daß das Gericht anstatt Strafe eine entsprechende Maßnahme (z. B. Verweisung zur Probe) anwenden kann. Dies fällt zwar außerhalb der Strafzumessung, deren Grundsätze jedoch trotzdem auch in einem solchen Fall zur Bedeutung kommen.

Im Kreise der Grundsätze der Strafzumessung ist das Ziel der Strafe von großer Bedeutung. Die Problematik der Strafzwecke steigt jedoch hier von den Höhen der Philosophie, Ethik und Kriminalpolitik ab und wird zu einer Frage der Rechtsanwendung vereinfacht. In Verbindung mit der Strafzumessung muß nicht die Frage erörtert werden, was soll oder kann das Ziel der Strafe sein und was nicht, sondern welche Rolle die im Gesetz bestimmten Zielsetzungen der Strafe bei der Strafzumessung zu spielen haben. In Bezug der Strafzumessung bedeutet das Ziel der Strafe für das Gericht diejenigen im Gesetz bestimmten, vom Gesetzgeber als wünschenswert betrachteten Wirkungen der Strafe, deren Erlangung das Gericht durch die Bestimmung von Art und Maß (eventuell Vollstreckungsart) der Strafe zu fördern hat. Das Gericht selbst ist natürlich nur sehr selten in der Lage sich der Erreichung des Zieles vergewissern zu können. Die allgemeine Vorbeugung kann sogar nicht die Wirkung des Einzelurteils sein, sondern vielmehr die der ganzen Strafrechtspflege.

Von den Umständen, die in den gesetzlich bestimmten Strafzumessungsgrundsätzen aufgeführt werden, mißt FÖLDVÁRI dem Strafziel die größte Bedeutung bei, indem er meint, dieses spielt bei der Bestimmung der Strafart und des Strafmaßes die wichtigste Rolle.[6] Die Bedeutung des Zieles bei der Strafzumessung erkennen wir

[5] MOLDOVÁNYI, GY.: *A büntetés kiszabásával kapcsolatos kodifikációs javaslatok. A büntetett élethez fűződő hátrányok alóli mentesítés új szabályozásával kapcsolatos elképzelések.* (Kodifikationsvorschläge zur Strafzumessung. Die Neuregelung der Befreiung von den nachteiligen Folgen des bestraften Vorlebens betreffende Vorstellungen.) Magyar Jog, 1976. p. 939.

[6] FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) p. 204.; RENDEKI, S.: *A büntetés kiszabása. Enyhítő és súlyosító körülmények.* (Die Strafzumessung. Mildernde und erschwerende Umstände.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1976. pp. 23. ff.

natürlich an; wenn wir dies nicht täten, würden wir mit dem Gesetz in Konflikt geraten. Nur auf einen Gesichtspunkt möchten wir die Aufmerksamkeit lenken. Darauf nämlich daß den direkten Zusammenhang zwischen den Strafzielen und der zur Anwendung gelangenden Strafe herzustellen nicht nur daher unmöglich ist, weil die gesetzlichen Rahmen für den Richter verbindlich sind, sondern auch weil das StGB die Zumessung einer sich nach den Umständen richtenden Strafe vorschreibt, die in den Strafzumessungsgrundsätzen aufgeführt werden. Die der Verwirklichung des im StGB im allgemeinen bestimmten Strafzieles dienenden Mittel fallen also unter eine doppelte Einschränkung. Erstens zufolge des proportionellen Systems der Strafsätze, zweitens der gesetzlichen Bestimmung, die eine sich unter den festgelegten Rahmen nach der konkreten Straftat und dem Täter, sowie den Strafzumessungsumständen richtende Strafzumessung vorsieht.

Unsere Vorstellungen über die Gerechtigkeit im Strafrecht knüpfen sich an die Proportionalität der Strafen; wir könnten daher sagen, daß man die Anforderungen der Zweckmäßigkeit mit Rücksicht auf die Gerechtigkeit erfüllen kann. Wir stimmen mit Tibor KIRÁLY überein, da er schreibt: „Die für die einzelnen Verbrechen gesetzlich bestimmten Strafen werden vielmehr durch die Proportionalität charakterisiert, als durch die Zweckmäßigkeit, obgleich wir damit keinesfalls die Zweckmäßigkeit der proportionellen Strafe leugnen."[7]

Wir sind andererseits mit FÖLDVÁRI darüber vollkommen einig, daß die im Gesetz umrissenen Strafzumessungsumstände mit dem Ziel der Strafe in enger Verbindung sind, und auch die Auffassung für richtig halten, daß die subjektiven Umstände für die Zielsetzung der individuellen, während die objektiven Umstände für die der allgemeinen Vorbeugung von größerer Bedeutung sind.[8]

Die Weglassung einer detaillierten gesetzlichen Aufführung der mildernden und erschwerenden Umstände heißen wir selbst auch gut,[9] das macht jedoch die Ausarbeitung der allgemeinen Sätze zur Strafzumessung nicht überflüssig. In dieser Hinsicht stellt die Richtlinie Nr 12 des Obersten Gerichtes[10] die als Zusammenfassung früherer Einzelentscheidungen und Stellungnahmen auf Teilgebieten erlassen wurde, einen verbindlichen Leitsatz für die Gerichte dar.

Das Fehlen der ausführlichen Regelung von mildernden und erschwerenden Umständen und die im Gesetz bestimmten allgemeinen Strafzumessungsgrundsätze nähren die Ansicht in unserem Schrifttum, die die Bedeutung des freien Ermessens in der richterlichen Strafzumessung hervorheben.

[7] KIRÁLY, T.: *Büntetőítélet a jog határán.* (Strafurteil an der Grenze des Rechts.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1972. p. 238.

[8] FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) pp. 204—206.

[9] GYÖRGYI, K.: *A büntetéskiszabás elvi kérdései és a kodifikáció.* (Grundsätzliche Probleme der Strafzumessung und die Kodifikation.) Jogtudományi Közlöny, 1977. p. 133.

[10] Bírósági Határozatok, 1977/2., S. noch RÁCZ, GY.: *A Legfelsőbb Bíróság 12. sz. irányelve* (Richtlinie Nr. 12. des Obersten Gerichts.) Magyar Jog, 1977, pp. 289—301

Wir wollen nicht bestreiten, daß „der am wenigsten exakt begründbare Teil des gerichtlichen Urteils die Strafzumessung, darin die Bestimmung des Strafmaßes ist."[11] Trotzdem können wir die Ansicht nicht teilen, die in der Strafzumessung das freie Ermessen sieht. GYÖRGY RÁCZ schreibt: „Die Strafzumessung ist das Ergebnis einer freien Erwägungstätigkeit, eine selbständige, gerichtliche Bewertung."[12] Diese Tätigkeit des Gerichtes ist darin gewiß frei, daß das Gesetz die Strafzumessungsumstände und deren Erwägungsrichtungen nicht vorschreibt. Die Grundsätze der Strafzumessung werden jedoch im Gesetz bestimmt, deren Anwendung nicht die Geltendmachung der selbständigen Bewertung des Richters, sondern eben die des Gesetzes voraussetzt. Die Strafzumessung stellt also selbst eine Art Rechtsanwendung dar, obgleich die Beurteilung und Erwägung des Gerichts im Zuge dieser Rechtsanwendung zu größerer Bedeutung gelangt, als bei der Qualifizierung der Handlung nach dem Strafgesetz. Wenn wir im prozeß der Strafzumessung keine Rechtsanwendung sehen, könnten wir von der zugemessenen Strafe kaum sagen, daß sie gesetzwidrig ist. Das wird aber in unserer Rechtsprechung in jedem Fall festgestellt, wenn das Maß der zugemessenen Strafe abstechend schwer oder mild ist.[13]

2. Die Umstände der Strafzumessung

Das neue StGB besagt, daß die zugemessene Strafe sich nach der Gesellschaftsgefährlichkeit der Straftat und des Täters, dem Schuldgrad, ferner den anderen erschwerenden und mildernden Umständen richten soll. Diese Bestimmung wird schon seit den Diskussionen, die dem StGB v. J. 1961 vorangingen, einheitlich im Schrifttum und in der Rechtsprechung in der Weise ausgelegt, daß diese alle mildernde und erschwerende Umstände sind; das Wort „andere" deutet ja darauf hin, daß die Gesellschaftsgefährlichkeit der Straftat und des Täters, sowie der Schuldgrad in diese Kategorie fallen. Die gesetzliche Formulierung der im StGA bestimmten Grundsätze der Strafzumessung hat schon zum Ausdruck gebracht, daß die „Gesellschaftsge-

[11] WIENER, I.: *A tipikus eset szankciója a büntetési keretben.* (Die Sanktion des typischen Falles im Strafrahmen.) Magyar Jog, 1971. pp. 592—595.

[12] RÁCZ, GY.: *A büntetés kiszabása.* (Die Strafzumessung.) In: HALÁSZ, S.: (Red.): *A büntető törvénykönyv kommentárja.* Bd. I—II (Kommentar des Strafgesetzbuches.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1968. Bd. I. p. 310. Die Wurzeln dieser Auffassung liegen in früheren Zeiten. Angyal und Rácz gingen 1937 davon aus, daß der damals geltende Kodex „lange entstanden und in vielen Hinsichten überholt ist", sie schlugen daher vor, daß das Gericht „bei der Bewertung der Umstände, die als Grundlage der Strafzumessung dienen" nicht das gesetzte Recht, „sondern die Lebensauffassung der Gesellschaft, ihren als gemeinnützig qualifizierten Gerechtigkeitssinn und ihre sozialethische Beurteilung direkt verwende". ANGYAL, S. P.—RÁCZ, GY.: *A büntetés kiszabása bírói gyakorlatunkban.* (Die Strafzumessung in unserer Rechtsprechung.) Budapest 1937. Verlegt durch Attila-nyomda Részvénytársaság, p. 18.

[13] Neuestens die Stellungnahme Nr. 27 des Straf- und Militärkollegiums des Obersten Gerichts. Bírósági Határozatok, 1979/6. Vgl. noch KELEMEN, G.: *Mikor lényegesen enyhe vagy aránytalanul súlyos a büntetés?* (Wann ist die Strafe wesentlich mild oder unangemessen schwer?) Magyar Jog, 1957. pp. 184—187.

fährlichkeit der Straftat", die „aus der Persönlichkeit des Täters auf die Gesellschaft fallende Gefahr" und die Schuld des Täters ebenso „die Strafe erschwerende und mildernde Umstände" darstellen, wie die besonders hervorgehobenen „herbeigeführte Schädigung" und „die sonst zu beachtenden" Umstände. Der Motivenbericht zum Entwurf des StGA hat auch gesondert festgestellt: „Diejenigen Umstände, die im Sinne des § 50. Abs. 2 bei der Strafzumessung zu beachten sind, werden im StGA die Strafe erschwerende bzw. mildernde Umstände genannt."[14]

In der Rechtsprechung kam trotzdem eine Auffassung zur Geltung, die auch im Schrifttum vertreten wurde, wonach das Gericht im Zuge der Strafzumessung zuerst das Maß der objektiven Gesellschaftsgefährlichkeit der Straftat, und der aus der Persönlichkeit des Täters auf die Gesellschaft fallende Gefahr beurteilt, und erst danach die erschwerenden und mildernden Umstände, die „Schuldumstände".[15]

Der Motivenbericht zum Gesetzesentwurf des StGB von 1961 hat dann noch eindeutiger erklärt, daß „jeder Umstand, den das Gericht bei der Entscheidung der Frage beachtet, welche Strafart im Falle eines alternativen Strafsatzes gewählt, ferner in welchem Maße die konkrete Strafe zwischen der unteren und oberen Grenzen des Strafsatzes bestimmt werden soll, stellt einen erschwerenden oder mildernden Umstand dar."[16]

Diese Formulierung ist aus dem Gesichtspunkt tadellos, daß sie der Trennung der im Gesetz hervorgehobenen Umstände von den mildernden und erschwerenden Umständen vorbeugt. Sie ist aber insofern von formellem Charakter, daß sie keinen Anhaltspunkt dafür gibt, welche andere Umstände bei der Strafzumessung außer der im Gesetz hervorgehobenen zu beachten sind. Es ist der Verdienst von FÖLDVÁRI in unserem Schrifttum, daß er nachwies, bei der Strafzumessung müssen diejenigen

[14] KÁDÁR, M.: *A büntetőtörvénykönyv általános része.* (Allgemeiner Teil des Strafgesetzbuches) p. 140.; Zu den Grundsätzen der Strafzumessung im StGA vgl. die interessante Artikelserie von Székely. SZÉKELY, J.: *A motívum vizsgálatának jelentősége a büntetés kiszabásánál.* (Die Bedeutung des Motivs bei der Strafzumessung.) Magyar Jog, 1954. pp. 39—42.; *Az előélet tisztázása és ennek jelentősége a büntetés kiszabásánál.* (Untersuchung des Vorlebens und deren Bedeutung bei der Strafzumessung) Magyar Jog, 1955. pp. 35—36.; *A bűncselekmény társadalomra veszélyességének vizsgálata és a büntetéskiszabás.* (Untersuchung der Gesellschaftsgefährlichkeit der Straftat und die Strafzumessung.) Magyar Jog 1955. pp. 132—136.; *A bűncselekménnyel okozott sérelem.* (Schädigung durch die Straftat) Magyar Jog, 1955. pp. 260—263.

[15] Zsámár erwähnte z.B. in Bezug von § 50. StGA den Strafsatz, die Gesellschaftsgefährlichkeit und die Schuldumstände als selbständige Elemente der Verfügung. S. ZSÁMÁR, GY.: *A büntetéskiszabás időszerű kérdései.* (Aktuelle Fragen der Strafzumessung) Magyar Jog, 1959. pp. 202—207. S. noch RÁCZ, GY.: *A büntetlen előélet értékelése rehabilitáció esetén.* (Die Bewertung des unbestraften Vorlebens im Falle der Rehabilitation.) Magyar Jog, 1959. p. 8. Diese Auffassung wird kritisiert durch: MOLNÁR, L.: *A büntetést meghatározó tényezők.* (Bestimmende Faktoren der Strafe.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1961. p. 18. Nach Schultheisz: „Als Folge dieses Verfahrens von zwei Ebenen sind zwei miteinander unvergleichliche Kategorien entstanden: einerseits die erschwerenden und mildernden Umstände, andererseits zweierlei Maß der Gesellschaftsgefährlichkeit." SCHULTHEISZ, S.: Az új büntető törvénykönyv tervezetének általános részéről. (Über den allgemeinen Teil des Entwurfs des neuen Strafgesetzbuches.) Jogtudományi Közlöny, 1960. p. 658.

[16] *A Magyar Népköztársaság Büntető Törvénykönyve.* (Strafgesetzbuch der Ungarischen Volksrepublik) (Veröffentlichung des Justizministeriums) Budapest, Közgazdasági és Jogi Könyvkiadó, 1962. p. 129.

Umstände beachtet werden, die aus dem Gesichtspunkt der Verwirklichung des Strafziels von Bedeutung sind.[17] Die im Gesetz betonten Umstände: die Gesellschaftsgefährlichkeit der Straftat und des Täters, sowie der Schuldgrad sind gewiß von solcher Bedeutung, das hat der Gesetzgeber im voraus entschieden. Das Erkenntnis von FÖLDVÁRI hat daher seine Bedeutung außer diesem Kreis, bei der Beachtung der anderen mildernden und erschwerenden Umstände. Das Ziel der Strafe spielt aber auch bei der Feststellung der Erwägungsrichtung dieser Umstände eine bedeutende Rolle.

Der Motivenbericht des neuen StGB konzipiert die erschwerenden und mildernden Umstände — nach FÖLDVÁRI — folgendermaßen: „Erschwerend und mildernd ist jeder Umstand, der bei der Strafzumessung im Interesse der Verwirklichung des Zieles der Strafe zu beachten ist."[18]

Für die Bezeichnung der im Zuge der Strafzumessung zu berücksichtigenden Umstände sind in unserer heutigen Rechtssprache mehrere Ausdrücke üblich. Sie werden „erschwerende und mildernde Umstände genannt", MOLNÁR schrieb mit einer zusammenfassenden Benennung von den „die Strafe bestimmenden Faktoren" diese wird auch bei RENDEKI verwendet[19] im neuen StGB §45. Abs. 2. finden wir die Bezeichnung" bei der Strafzumessung maßgebende Umstände", es ist auch der Wortgebrauch „Strafzumessungsumstände" bekannt, sowohl im Schrifttum, wie auch in der Rechtsprechung hält sich jedoch auch der Terminus „Schuldumstände" hartnäckig.[20]

So schrieb z. B. der Motivenbericht des StGB v. J. 1961 an einer Stelle: „was für eine Strafe zur Anwendung kommen soll ... das hängt von den Schuldumständen ab."[21] Diese Bezeichnung blickt auch in der Richtlinie Nr 12 des Obersten Gerichts zurück.[22]

FÖLDVÁRI läßt sich, die erwähnte Wendung des Motivenberichtes wortwörtlich auffassend, mit der — ansonsten und durch andere tatsächlich vertretenen — Ansicht in meritorische Diskussion ein, die bei der Strafzumessung dem Schuldgrad die entscheidende Rolle zuschreibt.[23]

[17] FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) p. 264.

[18] KÁDÁR, K.—MOLDOVÁNYI, GY.: *Büntető Törvénykönyv* (Strafgesetzbuch) Budapest, Közgazdasági és Jogi Könyvkiadó, 1979. p. 127.

[19] MOLNÁR, J.: A büntetést meghatározó tényezők. (Die bestimmenden Faktoren der Strafe.); RENDEKI, S.: *A büntetés kiszabása. Az enyhítő és súlyosító körülmények.* (Die Strafzumessung. Die mildernden und erschwerenden Umstände.) pp. 45—47.

[20] GYÖRGYI, K.: *A büntetéskiszabás elvi kérdései és a kodifikáció.* (Prinzipielle Fragen der Strafzumessung und die Kodifikation.) 1977. p. 134.

[21] *A Magyar Népköztársaság Büntető Törvénykönyve.* (Strafgesetzbuch der Ungarischen Volksrepublik) p. 128.; RENDEKI, S.: *A büntetés kiszabása.* (Die Strafzumessung) p. 317.; RÁCZ, GY.: *A büntetéskiszabás elvi kérdései.* (Grundsätzliche Probleme der Strafzumessung.) p. 200.

[22] Bírósági Határozatok, 1977/2.

[23] FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) pp. 253—256.; richtig weist auch Rendeki darauf hin. RENDEKI, S.: *A büntetés kiszabása. Enyhítő és súlyosító körülmények.* (Die Strafzumessung. Die mildernden und erschwerenden Umstände.) p. 46.; GYÖRGYI, K.: *A bűncselekmény büntetőjogi*

Der Hinweis auf die Schuldumstände will aber weder im Motivenbericht zum StGB v. J. 1961, noch anderswo zum Ausdruck bringen, daß nur der Grad der subjektiven Schuld bei der Strafzumessung von Bedeutung wäre,[24] sondern es handelt sich hier einfach um eine unrichtige Bezeichung für die Strafzumessungsumstände. Diese Benennung hat selbstverständlich ihre eigene Wurzel, die in die Vergangenheit zurückreichen.

Der Entwurf v. J. 1843 enthielt noch Bestimmungen über die „Zurechnung" mildernden, bzw. erschwerenden Umstände. Nach dem sog. CSEMEGI-Kodex (StGB Nr. V. v. J. 1978) § 89 aber sind bei der Strafzumessung „die den Schulgrad beeinflussenden mildernden und erschwerenden Umstände" zu berücksichtigen. Es gab zwar im Schrifttum auch einen Versuch, der diese auf den Schuldgrad Einfluß habenden mildernden und erschwerenden Umstände — kurz die Schuldumstände — tatsächlich auf den Grad der subjektiven Schuld einschränken wollte, mit der Begründung: der Gesetzgeber ist gezwungen „auf Grund von eminenter objektiven Merkmale vorzugehen", und die von ihm bestimmten Merkmale selbst „den Grad der subjektiven Schuld nicht vertreten",[25] aber der Schuldgrad hängt einerseits mit der Größe der objektiven Rechtsverletzung zusammen, andererseits die Praxis faßte die Schuldumstände von Anfang an in breitem Sinne auf, und zog sowohl die den Täter, wie auch die Handlung betreffenden Umstände in diesem Kreis zusammen.[26] ANGYAL und RÁCZ haben den Wortgebrauch des CSEMEGI-Kodex § 89. heftig kritisiert, und die Möglichkeit der Auslegung aufgeworfen, „wonach ausschließlich die mit der Schuld in direktem Zusammenhang stehenden, aus der psychologischen Eigenschaft des Täters ableitbaren subjektiven Umstände zu beachten sind."[27]

Die Verwendung des Ausdruckes „Schuldumstände" stellt heute das Weiterleben des Wortgebrauchs des allgemeinen Teiles des nunmehr vor 28 Jahren außer Kraft gesetzten CSEMEGI-Kodex dar und hat weder im positiven Recht, noch in der Theorie irgendeine annehmbare Grundlage. Die Strafzumessungsgrundsätze des neuen StGB nennen den Grad der Schuld einen mildernden oder erschwerenden Umstand, und es kann nur Verwirrung entstehen, wenn man zur Bezeichnung des alle diese Umstände

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következményei. In: PINTÉR, J. (Red.): *Büntetőjog. Általános rész.* (Strafrecht. Allgemeiner Teil.) Bd. II. Zweite (umarbeitete) Aufl., Budapest, Tankönyvkiadó, 1977. p. 229.; VÁGÓ, T.: *A büntetés kiszabásánál értékelhető körülmények, különös tekintettel a közlekedési bűncselekményekre.* (Die bei der Strafzumessung bewertbaren Umstände, mit besonderer Rücksicht auf die Verkehrsstrafsachen) Magyar Jog, 1976. pp. 273—282.

[24] Die Konferenz der Senatspräsidenten des Strafkollegium des Obersten Gerichts wies in ihrer Stellungnahme Nr. 1/1970 ausdrücklich darauf hin, daß „die Gesellschaftsgefährlichkeit der Straftat einen an der objektiven Seite primär erscheinenden Schuldumstand bildet." Bírósági Határozatok, 1970/8.

[25] KAUTZ, GY.: *A magyar büntetőjog tankönyve.* (Lehrbuch des ungarischen Strafrechts.) Budapest, Buchhandlung Eggenberger, 1881. p. 359.

[26] EDVI-ILLÉS, K.: *A büntetőtörvénykönyv magyarázata.* (Kommentar des Strafgesetzbuches.) 2. Aufl. Bd. I. Budapest, Verlag Révai Testvérek R. T. 1894. p. 327.

[27] ANGYAL, S. P.—RÁCZ, GY.: *A büntetés kiszabása bírói gyakorlatunkban.* (Die Strafzumessung in unserer Rechtsprechung.) p. 25.

umfassenden Begriff denselben Terminus verwendet. Diese Benennung ist daher nicht nur „irreführend"[28], sondern, wie wir schon bemerkt haben, einfach unrichtig.

Die Benennung: erschwerende und mildernde Umstände ist demgegenüber nicht nur allgemein gebräuchlich, sondern sie entspricht auch dem Gesetz. Eine zusammenfassende Bezeichnung ist trotzdem unverändert notwendig, daher haben wir für diesen Zweck die Bezeichnung: Strafzumessungsumstände vorgeschlagen.[29]

In Verbindung mit den erschwerenden und mildernden Umständen taucht noch ein Problem auf. Das lautet ganz einfach so: in welchem Verhältnis ist ein Umstand mildernd oder erschwerend? Die mildernden und erschwerenden Umstände bilden ja eine relative Kategorie von solchen Umständen, die in einem gewißen Vergleich, an irgendetwas bezogen die Strafe erschweren oder mildern. Diese Frage führt zum Problem der mittelmäßigen Strafe. Nach den mathematisch erklügelten Formeln des CSEMEGI-Kodex: im Falle, „wenn weder erschwerende noch mildernde Umstände vorhanden sind, oder diese einander gegenseitig ausgleichen, wird das Mittelmaß zwischen Maximum und Minimum für die Strafe festzustellende Zeitdauer bilden."[30] Wenn aber „die Schuldumstände" alle Umstände umfassen, die bei der Strafzumessung zu berücksichtigen sind, ist einfach nicht möglich, daß solche Umstände nicht vorhanden sein, wenn wir die erschwerenden und mildernden Umstände nicht so auslegen möchten, wie EDVI ILLÉS nach CSEMEGI vorschlug. Nach seiner Auffassung sind mildernde Umstände diejenigen, die die Minderung unter den Mittelwert bis zum Minimum begründen, erschwerende Umstände aber, die die Strafe über den Mittelwert, gegebenenfalls bis zum Maximum erhöhen.[31]

Wodurch aber die der Straftat entsprechend zugemessene Strafe mittelmäßig sein wird, davon erfahren wir nichts. Abgesehen jedoch diesmal von der Möglichkeit der Milderung, scheint diejenige Hälfte der Ausgangsformel richtig zu sein, wonach im Falle wenn die mildernden und erschwerenden Umstände einander ausgleichen, eine Strafe um die Höhe des Mittelmaßes begründet ist. Nur dann aber, wenn wir den Begriff der mildernden und erschwerenden Umstände richtig auffassen.

All das ist deswegen einer Untersuchung wert, weil SCHULTHEISZ den Standpunkt vertrat, daß als mildernde oder erschwerende Umstände „nur solche Umstände in Betracht kommen können, die vom Durchschnitt nach oben oder nach unten eine starke Abweichung verursachen, d. i. die Schwere der Gesellschaftsgefährlichkeit in großem Maße erhöhen, bzw. vermindern."[32] Nach FÖLDVÁRI sind

[28] RENDEKI, S.: *A büntetés kiszabása. Enyhítő és súlyosító körülmények.* (Die Strafzumessung. Die mildernden und erschwerenden Umstände.) pp. 46—47.

[29] GYÖRGYI, K.: *A büntetéskiszabás elvi kérdései és a kodifikáció.* (Prinzipielle Fragen der Strafzumessung und die Kodifikation) p. 134. S. noch: GYÖRGYI, K.: *A bűncselekmény büntetőjogi következményei.* (Strafrechtliche Folgen der Straftat.) p. 229.

[30] LŐW, T.: *A magyar büntetőtörvénykönyv a bűntettekről és vétségekről (1878:5. tcz.) és teljes anyaggyűjteménye.* (Das ungarische Strafgesetzbuch über die Verbrechen und Vergehen (Gesetz Nr. 5. v. J. 1878) mit vollständiger Materialsammlung.) Budapest, Verlag Pesti könyvnyomda r. t., 1880. Bd. I. p. 71

[31] EDVI-ILLÉS, K.: *A büntetőtörvénykönyv magyarázata.* (Kommentar des Strafgesetzbuches) p. 327.

[32] SCHULTHEISZ, S.: *A büntetés kiszabása.* (Die Strafzumessung.) Budapest, Jogi és Államigazgatási Könyv- és Folyóiratkiadó, 1953. p. 9.

aber solche Umstände zu beachten, die „ein viel größeres oder viel milderes Gepräge der Gesellschaftsgefährlichkeit als regelmäßig ergeben."[33] Wenn wir die Ansicht von FÖLDVÁRI annehmen würden, hinge der Vergleichsgrund von den Strafsachen ab, die vor das Gericht gelangen. Wenn wir andererseits die Auffassung von SCHULTHEISZ gutheißen, könnten wir leicht zum Punkt gelangen, wo die Gesellschaftsgefährlichkeit der Straftat weder nach unten, noch nach oben eine „starke" Abweichung zeigt, also da wir weder einen mildernden noch einen erschwerenden Umstand feststellen können, und mit der These nichts anfangen können, wonach als mildernder oder erschwerender Umstand alles betrachtet wird, das das Gericht bei der Strafzumessung berücksichtigt, weil es hier nichts zu berücksichtigen wäre. Wir möchten dabei nicht glauben, daß z. B. die mittelmäßige Gesellschaftsgefährlichkeit der Straftat kein Strafzumessungsumstand wäre.

Wir haben aber noch ein Bedenken. Warum wäre nur die wesentliche Abweichung zu beachten? Eine wesentliche Abweichung in der Gesellschaftsgefährlichkeit der Handlung muß offensichtlich — in irgendeinem Verhältnis — eine wesentliche Abweichung im Maße der Strafe selbst ergeben. Eine Strafe die weniger wesentliche Abweichung aufweist, kann offensichtlich eine weniger wesentliche Abweichung in der Gesellschaftsgefährlichkeit begründen. Kann das kein mildernden oder erschwerenden Umstand bilden?

Nach alledem sind wir der Meinung, daß der Begriff der mildernden und erschwerenden Umstände eine nähere Erklärung beansprucht.

Im System des neuen StGB kann dieses Problem durch die Zugrundelegung des Begriffs der Gesellschaftsgefährlichkeit der Straftat gelöst werden.

3. Die Gesellschaftsgefährlichkeit der Straftat

Das neue StGB mißt der Gesellschaftsgefährlichkeit der Straftat eine große Bedeutung bei. Der Motivenbericht zum Gesetzesentwurf erwähnt, daß eine Handlung, die einen Tatbestand im besonderen Teil verwirklicht, keine Straftat darstellt, wenn sie „zufolge der konkreten Umstände der Begehung nicht gesellschaftsgefährlich ist."[34]

[33] FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) p. 251.

[34] KÁDÁR, K.—MOLDOVÁNYI, GY.: *Büntető Törvénykönyv.* (Strafgesetzbuch) p. 47. Zur Vorgeschichte s. FÖLDVÁRI, J.: *Az egység és a halmazat határesetei a büntetőjogban.* (Grenzfragen der Tateinheit und Konkurrenz im Strafrecht.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1962. p. 110.; KÁDÁR, K.: *Megjegyzések a társadalomra nem veszélyes vagy csekély fokban veszélyes cselekmények problémájához.* (Bemerkungen zum Problem der nicht gesellschaftsgefährlichen oder wenig gefährlichen Handlungen.) Magyar Jog, 1972. pp. 561—567.; SZEDER, GY.: *Néhány érv a bűncselekmény-fogalom teljessége mellett.* (Einige Argumente für die Vollständigkeit des Begriffes der Straftat.) Magyar Jog, 1973. pp. 644—647.; KÁDÁR, K.: *A bűncselekmény-fogalom teljessége védelmében.* (Zum Schutz der Vollständigkeit des Begriffes der Straftat.) Magyar Jog, 1974. pp. 483—486.

Wenn aber die Handlung gesellschaftsgefährlich ist, jedoch in so geringem Maße, daß auch die laut Gesetz anwendbare mildeste Strafe als unnötig erscheint, liegt ein Strafausschließungsgrund vor, und in diesem Falle ist nur eine Verwarnung anzuwenden. Wenn keine solche Fälle vorhanden sind, bestimmt das Gericht die Strafe im Sinne der anzuwendenden Strafzumessungsgrundsätze.

Das Gericht hat die Strafe in der Weise zuzumessen, daß diese sich nach der Gesellschaftsgefährlichkeit der Straftat und des Täters, dem Schuldgrad und anderen erschwerenden und mildernden Umständen richte. FÖLDVÁRI meint, daß die Vorstellung „keinen prinzipiellen Grund hat", wonach wir einen beliebigen Faktor von diesen herausheben und vor die anderen setzen, weil die Faktoren bei der Strafzumessung nicht allein für sich zur Bedeutung gelangen, sondern nur über die Vermittlung der Zielsetzung der Strafe.[35] Eine solche Heraushebung hat unserer Meinung nach ihren prinzipiellen Grund.

Den Grund der im Gesetz bestimmten Strafsätze bildet die allgemeine Beurteilung des Gesetzgebers von der schuldhaft begangenen gesellschaftsgefährlichen Handlung. Die Strafzumessungsumstände aber stellen die Anforderung, daß die zugemessene Strafe mit den angegebenen Strafzumessungsumständen im Verhältnis stehe. Diese Proportionalität kann einfach keinen anderen Grund haben, als die Gesellschaftsgefährlichkeit der Straftat. Weder die Schuld des Täters, noch dessen persönliche Gesellschaftsgefährlichkeit kann an und für sich nicht existieren, sondern nur im Zuge der begangenen gesellschaftsgefährlichen Straftat. Andererseits wenn wir die Gesellschaftsgefährlichkeit der Handlung mit dem bei uns vorherrschenden Standpunkt als eine objektive Kategorie auffassen,[36] ist diese von beiden anderen Umständen unabhängig.

Bei der Strafzumessung kann man im gesetzlich bestimmten Rahmen nicht von einer abstrakten, von der konkreten gesellschaftsgefährlichen Handlung losgelösten Schuld oder Gesellschaftsgefährlichkeit des Täters ausgehen, sondern nur aus der Gesellschaftsgefährlichkeit der Straftat. Die durch die Straftat herbeigeführte Verletzung des Rechtsgutes oder dessen Gefährdung bedeutet für das Gericht die Berücksichtigung der in der Außenwelt wahrnehmbaren und mit annähernder Genauigkeit feststellbaren Wirkungen der Straftat. Daran, als zu einem Bezugspunkt knüpft sich die Beurteilung des Schuldgrades und der Gesellschaftsgefährlichkeit des Täters. Wir sind daher der Meinung, daß das Gericht sowohl theoretisch wie auch methodologisch bei der Strafzumessung als erste Aufgabe den Grad der Gesellschaftsgefährlichkeit der Straftat festzustellen hat. Die Bestimmung des Gefährlichkeitsgrades zieht jedoch nicht die Feststellung eines bestimmten Maßes einer bestimmten Strafart nach sich. Nicht nur weil — wie es aus der Natur der

[35] FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) p. 250.

[36] VISKI, L.: *Tézisek a bűncselekményfogalom felépítéséhez.* (Thesen zum Aufbau des Verbrechensbegriffs.) Állam- és Jogtudomány, 1974. pp. 383. ff.; FÖLDVÁRI, J.: *Az egység és a halmazat határesetei a büntetőjogban.* (Grundfragen der Tateinheit und Konkurrenz im Strafrecht.) pp. 82. ff.

gerichtlichen Strafzumessung folgt, — ein exakt verifizierbares Quantum eine irrreale Forderung wäre,[37] sondern auch weil die Strafe nach den Grundsätzen der Strafzumessung sich nicht bloß nach der Gesellschaftsgefährlichkeit der Straftat, sondern außerdem nach dem Schuldgrad, der Gesellschaftsgefährlichkeit des Täters und den anderen mildernden und erschwerenden Umständen richten soll. Das der Gesellschaftsgefährlichkeit der Straftat entsprechende Strafmaß bedeutet innerhalb des Strafsatzes einer weiteren Spielraum, in der wir sagen können, daß die Strafe mit der Gesellschaftsgefährlichkeit der Straftat in richtigem Verhältnis steht, oder mit einer anderen Formulierung: „die Beurteilung der persönlichen Gesellschaftsgefährlichkeit kann im Zuge der Strafzumessung von der Bewertung der Gesellschaftsgefährlichkeit der Straftat nicht getrennt werden. Die Bedeutung der Gesellschaftsgefährlichkeit der Straftat kann nie verschwinden."[38]

Wie auch das Maß der richtigen Strafe mit mathematischer Genauigkeit nicht feststellbar ist, wäre ebenso ein Fehler von uns Rechenschaft darüber zu verlangen, wo die exakten Grenzen des Rahmens liegen, der dem Grad der Gesellschaftsgefährlichkeit der Straftat entspricht. Das kann man zahlenmäßig nicht bezeichnen, nur die bei der Strafzumessung zu befolgende grundlegende Anschauung wird dadurch bestimmt. Diese schließt die Möglichkeit solcher Feststellungen aus, wie: „die objektiven Faktoren sind mehr untergeordnet".[39] Damit wir die Bedeutung der von uns vertretenen Anschauung mit einem von weitem stammenden, vielleicht nicht genug zutreffenden Beispiel veranschaulichen: nicht so, wie ein Autor vor einem Vierteljahrhundert, halte ich es für unvorstellbar, „daß man einen Täter, dessen Gesellschaftsgefährlichkeit überdurchschnittlich ist, — nehmen wir an, er wurde z. B. in den letzten 5 Jahren zehnmal, darunter siebenmal wegen Diebstahls gegen das gesellschaftliche Eigentum bestraft, — wegen eines einzigen gestohlenen Glases zu zwei oder drei Jahren verurteilt."[40]

Unsere Auffassung bedeutet nicht — und möchten es besonders betonen — daß wir den Schuldgrad und die Gesellschaftsgefährlichkeit des Täters als Strafzumessungsumstand mißachten; sie bezeichnet bloß die gesetzlichen Rahmen der Beurteilung dieser Umstände. Die ausschlaggebende Bedeutung der Gesellschaftsgefährlichkeit der Straftat im Zuge der Strafzumessung ist eine wichtige Folge und zugleich Erfordernis der tatstrafrechtlichen Anschauung. Die letztere kam in der Stellungnahme der Hauptkommission während der Vorbereitung des neuen StGB entschieden

[37] Bagi, S. D.: *Mikor lényegesen enyhe vagy aránytalanul súlyos a büntetés?* (Wann ist die Strafe wesentlich mild oder unangemessen schwer?) Magyar Jog, 1957. pp. 244—247.

[38] Györgyi, K.: *A büntetéskiszabás elvi kérdései és a kodifikáció.* (Prinzipielle Fragen der Strafzumessung und die Kodifikation.) p. 133. Moldoványi, Gy.: *A büntetés kiszabásával kapcsolatos kodifikációs javaslat.* (Kodifikationsvorschläge zur Strafzumessung.) p. 939.

[39] So die Richtlinie Nr. 6. des Obersten Gerichts. Büntetőjogi Döntvénytár, 3887. Budapest, Közgazdasági és Jogi Könyvkiadó, 1968.

[40] Olti, V.: *A büntetőtárgyalás vezetése.* (Die Verhandlungsleitung in Strafsachen.) Jogtudományi Közlöny, 1952. p. 270.

zum Ausdruck,[41] und wurde nach dem Inkrafttreten des StGB in der Richtlinie Nr 14 des Obersten Gerichtes bestätigt: „Die Grundlage der strafrechtlichen Verantwortlichkeit ist die schuldhaft begangene gesellschaftsgefährliche und strafbare Handlung, die objektive Schwere der Straftat und der Grad der Gesellschaftsgefährlichkeit des Verhaltens sind daher auch in dem Falle von grundlegender Bedeutung, wenn der Täter rückfällig ist."[42]

Das Gesagte zusammenfassend meinen wir, daß der Grad der Gesellschaftsgefährlichkeit der Straftat bei der Strafzumessung von entscheidender Bedeutung ist. Die Beurteilung des Schuldgrades und der Gesellschaftsgefährlichkeit des Täters und der anderen mildernden und erschwerenden Umstände kann innerhalb der Rahmen erfolgen, die durch die Gesellschaftsgefährlichkeit der Straftat bestimmt werden.[43]

Nach diesem in die Länge gezogenen Abstecher können wir zum Begriff der mildernden und erschwerenden Umstände zurückkehren. Wir glauben, daß es aus dem gesagten klar hervorging, daß wir den Bezugspunkt bei der Strafzumessung in dem Grad der Gesellschaftsgefährlichkeit der Straftat finden können; die anderen Umstände sind darauf bezogen als mildernde und erschwerende Umstände zu beurteilen. Diese Auffassung hat gleichfalls ihre eigene Schwäche. Den Grad der Gesellschaftsgefährlichkeit der Straftat setzt sie als gegeben voraus, obgleich auch dieser nach dem StGB einen mildernden oder erschwerenden Umstand darstellt. Der Richter müßte hier theoretisch so verfahren, daß er die Gesellschaftsgefährlichkeit der konkreten Straftat auf die Skala setzt, die die unterschiedlichen Grade der Gesellschaftsgefährlichkeit der Handlungen, die in den Kreis des Tatbestandes fallen oder fallen können, ausdrückt, und die Strafe in diesem Verhältnis feststellt. Der Vergleichsgrund bei der Feststellung des Grades der Gesellschaftsgefährlichkeit der Straftat ist also der Umfang der Gesellschaftsgefährlichkeit, die durch den Tatbestand

[41] MOLDOVÁNYI, GY.: *A büntetés kiszabásával kapcsolatos kodifikációs javaslatok.* (Kodifikationsvorschläge zur Strafzumessung.) pp. 937—944. Imre Markója hat in seinen Bericht zur Gesetzesvorlage im Parlament betont: „die Feststellung der strafrechtlichen Verantwortung richtet sich vor allem nach der Gesellschaftsgefährlichkeit der Tat." MARKÓJA, I.: *Az új Büntető Törvénykönyv.* Magyar Jog, 1979. p. 251.

[42] Igazságügyi Közlöny, 1979. p. 251.

[43] Unsere Ansicht kann daher mit der „Richtschnur-Theorie" von Miklós Kádár und György Kálmán nicht identifiziert werden. In dieser Theorie entspricht ein klar erkennbares Maß der Gesellschaftsgefährlichkeit der Straftat. S. KÁDÁR, M.—KÁLMÁN, GY.: *A büntetőjog általános tanai.* (Allgemeine Lehren des Strafrechts.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1966. p. 783. Daß die Straftat ihre Grenzen hat, haben wir natürlich nicht erfunden: „Wenn der Verbrechensbegriff die Strafe erfordert, wird durch die Realität der Straftat das Strafmaß erfordert. Die wahrhafte Straftat ist umgrenzt. Die Strafe soll auch umgrenzt sein, damit sie reell gestaltet wird, während die Umgrenzung nach einem Rechtsprinzip begrenzt sein müssen, um gerecht zu sein. Die Aufgabe besteht darin, die Strafe zur wirklichen Konsequenz des Verbrechens zu machen. Sie muß dem Verbrecher also die notwendige Wirkung seiner eigenen Tat, daher als seine eigene Tat erscheinen. Die Grenze seiner Strafe muß also die Grenze seiner Tat sein. Der bestimmte Inhalt, der verletzt ist, ist die Grenze des bestimmten Verbrechens." MARX, K.: *Debatten über das Holzdiebstahlsgesetz,* in: MARX, K.—ENGELS, F.: Werke. Band 1. Dietz Verlag, Berlin, 1958. p. 114. S. noch BERNER, A. F.: *Lehrbuch des deutschen Strafrechts.* Leipzig, 1857. pp. 19—21.

umfaßt und im Strafsatz ausgedrückt wird. Bei den Rechtsgütern, die stufenweise verletzbar sind, kann man dies durch die Größe des verursachten Schadens oder des materiellen Nachteils ziemlich genau messen. Es würde trotzdem sonderbar klingen, wenn der Täter einer Unterschlagung von Ft. 300 000 diese Summe selbst als mildernden Umstand in der Urteilsbegründung wiederhören würde, nur aus dem Grunde, daß noch auch die Summe von 1 Million als bedeutender Wert qualifiziert wird.[44] Es ist ja sicher, daß der erste Fall aus dem Gesichtspunkt der Gesellschaftsgefährlichkeit der Straftat eine mildere Strafe erfordert, als der zweite. Hier gibt es zwei mögliche Lösungen. Entweder akzeptieren wir den durchschnittlichen Fall von SCHULTHEISZ[45], — gemeint damit die mittelgradig gefährliche Straftat — und verwenden den Ausdruck: mildernder oder erschwerender Umstand damit verglichen obgleich der Begehungswert von Ft 300 000 auch auf dieser Grundlage einen mildernden Umstand bildete!), oder begnügen uns damit, daß das Urteil mit dem Hinweis auf die Strafe begründet wird, die sich nach der Gesellschaftsgefährlichkeit der Straftat richtet, und in diesem Vergleich angemessen ist. Das schließt natürlich bei den Straftaten mit hervorragender Gesellschaftsgefährlichkeit die Berufung auf den erschwerenden Umstand nicht aus, wie man dies auch bei einem geringfügigen Fall mildernder Umstand nennen kann. Dadurch wird aber nicht nur die „bedeutend" abweichende Gesellschaftsgefährlichkeit zum Strafzumessungsumstand — zum mildernden oder erschwerenden Umstand, — sondern jeder beliebige Grad der Gesellschaftsgefährlichkeit.

Es ist unvorstellbar, daß irgendein Grad der Gesellschaftsgefährlichkeit der Straftat nicht festzustellen wäre, und daher für die Strafzumessung nicht zu entscheidender Bedeutung gelange. Andererseits ist es leicht vorstellbar, und in der Praxis kommt es tatsächlich vor, daß kein mit dem Schulgrad, bzw. mit der persönlichen Gesellschaftsgefährlichkeit des Täters zusammenhängender mildernder oder erschwerender Umstand auftaucht. Meistens sind jedoch solche Umstände vorhanden, und der Grad und Charakter der persönlichen Gesellschaftsgefährlichkeit des Täters kommt oft bei der Wahl der Strafart, bei der Bestimmung der Vollstreckungsart, sogar auch bei der Entscheidung für die Anwendung von einer Maßnahme anstatt oder neben einer Strafe zur Bedeutung.

Vom Begriff der mildernden und erschwerenden Umstände können wir schließlich feststellen, daß diese in der Praxis öfters nicht geeignet sind die Beurteilung der Strafzumessungsumstände zu bezeichnen. In diesen Fällen ist es richtig, wenn das Gericht darauf hinweist, daß die festgesetzte Strafe der Gesellschaftsgefährlichkeit der Straftat, bzw. den anderen Strafzumessungsumständen angemessen ist.

[44] S. Strafrechtliche Grundsatzentscheidung Nr. II des Obersten Gerichts. Igazságügyi Közlöny, 1979. Nr. 7.

[45] SCHULTHEISZ, S.: *A büntetés kiszabása.* (Die Strafzumessung) p. 9.

4. Gruppierung der Strafzumessungsumstände

Eine der strittigsten Fragen in Bezug der Strafzumessungsumstände stellt deren Gruppierung dar.

Neben der Verbrechenslehre ist das ein zweites wesentliches Gebiet, wo das juristische Denken die im Leben einheitlich erscheinende Straftat zergliedert, und alles, was eine mildere oder schwerere Strafe begründet, an deren Bestandteile zu knüpfen wünscht. Während aber die Person des Täters im allgemeinen von der Verbrechenslehre ausgeschlossen wird,[46] gelangen bei der Strafzumessung auch solche Umstände zur Bedeutung, die außerhalb der Begriffselemente der Straftat fallen.

Die Gruppierung der Strafzumessungsumstände bietet sich als einfachste Methode die Distinktion zwischen Umständen, die sich auf die strafbaren Handlungen, und denen, die sich auf den Täter beziehen. Auf diesem Grund hat schon PAULER „subjektive und objektive Schwere der Schuld" unterschieden,[47] EDVI ILLÉS Umstände die sich „auf den Straftäter und auf die strafbare Handlung beziehen"[48], MOLNÁR die „zur subjektiven Seite" bzw. „zur objektiven Seite" gehörenden mildernden und erschwerenden Umstände.[49] Oder neuestens die Richtlinie Nr 12 des Obersten Gerichtes die Schuldumstände „subjektiver" und „objektiver" Natur.[50] Die Absonderung von Umständen subjektiver und objektiver Natur ist auch dort bedeutend, wo man eine mehr spezifizierte Gruppierung anstrebt. In unserer Literatur unterscheidet FÖLDVÁRI auf der Grundlage des allgemeinen Begriffes des Tatbestandes Umstände, die mit dem Objekt, der objektiven Seite, dem Subjekt und der subjektiven Seite der Straftat in Verbindung sind.[51]

Andere Gruppierungen sind auch bekannt. Z. B. in unserer früheren Literatur haben ANGYAL und RÁCZ Umstände unterschieden, die mit der Person des Verbrechers, den sozialen, kulturellen und wirtschaftlichen Faktoren der Kriminalität, mit den subjektiven und objektiven Elementen des Tatbestandes zusammenhängen,

[46] FÖLDVÁRI, S.: *Az egység és a halmazat határesetei a büntetőjogban.* (Grenzfragen der Tateinheit und Konkurrenz im Strafrecht); I. BÉKÉS: *A gondatlanság a büntetőjogban.* (Die Fahrlässigkeit im Strafrecht.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1974.; VISKI, L.: *Tézisek a bűncselekményfogalom felépítéséhez.* (Thesen zum Aufbau des Verbrechensbegriffs.); a. A.: TOKAJI, G.: *Adalékok a bűncselekményfogalom felépítéséhez.* (Beiträge zum Aufbau des Verbrechensbegriffes.) Szeged, Hungaria, 1972.

[47] PAULER, T.: *Büntetőjogtan.* (Strafrechtslehre) Bd. I—II Pest, Verlag Pfeifer Ferdinánd, 1864. Bd. I p. 260.

[48] EDVI-ILLÉS, K.: *A büntetőtörvénykönyv magyarázata.* (Kommentar des Strafgesetzbuches.) 1894. pp. 327—328.

[49] MOLNÁR, J.: *A büntetést meghatározó tényezők.* (Die bestimmenden Faktoren der Strafe.) p. 27.; ebenso RENDEKI, S.: *A büntetés kiszabása. Enyhítő és súlyosító körülmények.* (Die Strafzumessung. Mildernde und erschwerende Umstände.) pp. 62—63.

[50] Bírósági Határozatok, 1977/2.

[51] FÖLDVÁRI, J.: *Az enyhítő és súlyosító körülményekről.* (Über die mildernden und erschwerenden Umstände.) Budapest, Tankönyvkiadó, 1960. pp. 16. ff.; FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) pp. 266 ff.

sowie subjektive und objektive Umstände, die der Begehung entstehen, schließlich andere Umstände, die aus dem Gesichtspunkt der Zumessung von Bedeutung sind.[52]

Es sind auch solche Gruppierungen bekannt, die anstatt der inhaltlichen Kriterien der Strafzumessungsumstände deren Bewertungsrichtungen zugrunde legen. Die klare Verwirklichung dieser Idee hat der Entwurf von 1843 geboten, der schwerere und mildere Zurechnung ergebende Umstände unterschied. Dieser Gedanke ist mit der Unterschiedung zwischen objektiven und subjektiven Umständen kombiniert in den Werken zurückgekehrt, die den CSEMEGI-Kodex analysierten,[53] sogar auch in neueren Studien.[54]

Das StGA und die danach folgenden Gesetze haben bei der gesetzlichen Bestimmung der Strafzumessungsgrundsätze von den Strafzumessungsumständen die Gesellschaftsgefährlichkeit der Straftat und des Täters sowie den Schuldgrad hervorgehoben, indem sie auch auf andere mildernde und erschwerende Umstände hingewiesen haben. Es wäre auf der Hand gelegen, daß die im Gesetz bestimmten Gesichtspunkte auch im Schrifttum gewürdigt werden. Freilich finden wir auch solche Gruppierungen, vor allen Dingen bei SCHULTHEISZ,[55] aber auch bei KÁDÁR[56] und später auch bei anderen.[57]

Für TOKAJI scheint es gerade unbegreiflich zu sein, „warum die Systematisierung der erschwerenden und mildernden Umstände nach den vier Bestandteilen des gesetzlichen Tatbestandes im Rechtsschrifttum für lange Zeit konserviert wurde, und zwar trotz den Bestimmungen des StGA, die die Grundsätze der Strafzumessung im wesentlichen richtig zusammenfaßt". Nach SCHULTHEISZ meint er, daß „der Verbrechensbegriff die allein richtige Grundlage des Systems der erschwerenden und mildernden Umstände bietet".[58] Diese Auffassung teilen wir auch mit der kleinen

[52] ANGYAL, S. P.—RÁCZ, GY.: *A büntetés kiszabása bírói gyakorlatunkban.* (Die Strafzumessung in unserer Rechtssprechung.) Im wesentlichen folgt Rácz dieser Einteilung auch in seinem Kommentar zum StGB. S. RÁCZ: *A büntetés kiszabása.* (Die Strafzumessung) pp. 324. ff.

[53] EDVI—ILLÉS, K.: *A büntetőtörvénykönyv magyarázata.* (Kommentar des Strafgesetzbuches) pp. 327—328.

[54] MOLNÁR, J.: *A büntetést meghatározó tényezők.* (Die bestimmenden Faktoren der Strafe.) p. 27.

[55] SCHULTHEISZ, S.: *A büntetés kiszabása.* (Die Strafzumessung) 1953.

[56] KÁDÁR, M.: *Magyar Büntetőjog. Általános rész.* (Ungarisches Strafrecht. Allgemeiner Teil.) Budapest, Tankönyvkiadó, 1953. pp. 270—271. Nach der Klassifizierung folgt eine eklektische Aufzählung der mildernden und erschwerenden Umstände, wodurch diese Auffassung mehr an die — schon erwähnte — Loslösung der im Gesetz hervorgehobenen Umstände von den mildernden und erschwerenden Umständen erinnert.

[57] GYÖRGYI, K.: *A bűncselekmény büntetőjogi következményei.* (Strafrechtliche Folgen der Straftat.) pp. 219. ff.

[58] TOKAJI, G.: *Adalékok a bűncselekményfogalom felépítéséhez.* (Beiträge zum Aufbau des Verbrechensbegriffes.) p. 58. Das ist ansonsten die Projektion desselben Problems in der Straflehre, das auch unsere Literatur der Verbrechenslehre beschäftigt: was soll die Grundlage der wissenschaftlichen Systematisierung sein, der Begriff der Straftat oder der des gesetzlichen Tatbestandes. Daß die Wissenschaft auf diesem Gebiet gewissen Schwierigkeiten entgegensieht, wird auch dadurch bewiesen, daß Tokaji gewisse Probleme der Verbrechenslehre auf Grund des einen, andere Fragen mit Hilfe des anderen Begriffes zu lösen versucht.

Korrektion, daß wir die persönliche Gesellschaftsgefährlichkeit des Täters nicht als ein Merkmal des Verbrechensbegriffs betrachten.[59]

Wir sind der Meinung, daß die Definition, die im StGB v. J. 1961 formuliert und durch das neue StGB übernommen wurde, bringt zugleich die grundlegenden Gesichtspunkte der richtigen wissenschaftlichen Gruppierung der Strafzumessungsgrundsätze zum Ausdruck. Das macht die Aufdeckung des Inhaltes von einzelnen hervorgehobenen Strafzumessungsumständen natürlich nicht überflüssig die eine nähere Gruppierung beansprucht.

Die richtige Gruppierung der Strafzumessungsumstände hat ihre Bedeutung sowohl für die richtige Bestimmung des Kreises der zu beachtenden Umstände, wie auch die Vermeidung der Doppelverwertung der Tatbestandselemente und der Strafzumessungsumstände zugleich.

Auf Grund des geltenden Rechtes aber gibt es nach unserer Meinung einfach keine andere Grundlage zur Gruppierung der Strafzumessungsumstände, wie diejenige, die im § 83 StGB formuliert zu finden ist. In dieser Hinsicht stehen noch die Rechtsprechung ebenso, wie die Pfleger der Rechtsliteratur vor bedeutenden Aufgaben. Die Umstände aus dem Leben muß man nicht direkt mit den Zielen der Strafe in Zusammenhang bringen, sondern über die Vermittlung der im StGB bestimmten Strafzumessungsumstände.

Die in der Praxis ausgestalteten Bewertungen — deren Grundlagen aufdecken eine selbständige Analyse könnte, — sind nicht immer leicht an die im Gesetz bestimmten Strafzumessungsumständen anzuknüpfen. Ein Beispiel dafür ist die Richtlinie Nr 12 des obersten Gerichtes, der mitunter nur die Beurteilung enthält ohne überzeugende Gründe dafür geben zu können.[60]

Jede Gruppierung birgt viele Widersprüche in sich und es ist kaum möglich ein tadelloses System zu schaffen.[61] Bei jeder dieser Gruppierungen taucht als allgemeines Problem auf, wie die die Gesellschaftsgefährlichkeit beeinflussenden Faktoren den Grad der Schuld und der Gesellschaftsgefährlichkeit des Täters selbst beeinflussen, und wie die Doppelverwertung dieser Umstände vermieden werden kann.

[59] Später hat Tokaji die Gesellschaftsgefährlichkeit des Täters „unregelmäßiges" Merkmal des Verbrechensbegriffs genannt. S. NAGY, F.: *Über die Diskussion der Kandidaturthesen v. Géza Tokaji: „Beiträge zum Aufbau des Verbrechensbegriffes"*. Jogtudományi Közlöny, 1973. p. 283. S. noch TOKAJI, G.: *Fejezetek a büntetőjog általános része köréből.* (Fragen zum allgemeinen Teil des Strafrechts) 2. Aufl. Szeged, 1976. p. 49.

[60] So ist z.B. der bedingte Vorsatz nach der Richtlinie im allgemeinen ein mildender Umstand, während der direkte Vorsatz im allgemeinen keinen erschwerenden Umstand bildet. Erschwerende Umstände sind: die sehr schwer aufdeckbare Art der Begehung, die Begehung in größerer Zahl zu einer gegebenen Zeit, usw. Bírósági Határozatok, 1977/2.

[61] So werden z.B. bei Földvári die die eigene Person des Täters betreffenden schädlichen Auswirkungen zu den Umständen eingeordnet, die mit dem Objekt der Straftat in Verbindung sind, unter den Umständen die mit dem Subjekt und der subjektiven Seite zusammenhängen, erwähnt er die Fähigkeit zum Ertragen der Strafe, usw. S. FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) pp. 290. und 329.

DEMETER[62] und RENDEKI,[63] sowie MOLNÁR haben ANGYAL und RÁCZ mit Recht kritisiert, weil sie außer der mildernden und erschwerenden Umstände auch die Kategorie der „gleichgültigen" Umstände eingeführt haben. Was gleichgültig ist, kann freilich kein Strafzumessungsumstand sein, trotzdem ist diese Kategorie in der Praxis von großer Bedeutung, weil sie dazu Hilfe leistet, daß die Beurteilung sich in ein uferlosvulgäres Moralisieren entartet[64], andererseits kann man im voraus nicht wissen, ob irgendein Umstand im Zuge der Strafzumessung nicht gleichgültig wird.

Was die gesetzliche Bestimmung der Strafzumessungsumstände betrifft, wurde diese seit dem StGA in der Literatur im allgemeinen mit Billigung empfangen, es kam jedoch auch zu kritischen Wahrnehmungen.

Das Hervorheben des verursachten Schadens neben der Gesellschaftsgefährlichkeit der Straftat in der Bestimmung des StGA[65] erwies sich im Spiegel unserer späteren Gesetzgebung als überflüssig, obgleich seinerzeit eine separate Ideologie zur Absonderung dieses Faktors entstanden ist.[66] Heute ist es eine allgemein akzeptierte Meinung, daß der Begriff der Gesellschaftsgefährlichkeit der Straftat die Verletzung und Gefährdung der Rechtsgüter gleichfalls umfaßt.[67] Die Stelle des Begriffs der Gesellschaftsgefährlichkeit unter den Strafzumessungsumständen war bei keinem Autor strittig. Umsomehr war der Begriff und Daseinsberechtigung der Schuld und der persönlichen Gesellschaftsgefährlichkeit des Täters umstritten.

5. Die Schuld und die Gesellschaftsgefährlichkeit des Täters

Darin, daß das StGA die Schuld des Täters, das StGB v.J. 1961 und das neue StGB den Grad der Schuld in die bezügliche Regelung einbeziehen, kann man keinen wirklich wesentlichen Unterschied sehen. Die Formulierung des dritten Faktors gestaltete sich andererseits sehr interessant. Das StGA sprach von der „Gefahr, die aus der Persönlichkeit des Täters der Gesellschaft zufällt", der Entwurf zum StGB v.J.

[62] DEMETER, V.: *A súlyosító és enyhítő körülmények a bírói gyakorlatban.* (Die erschwerenden und mildernden Umstände in der Rechtssprechung.) Magyar Jog, 1965. p. 289.

[63] RENDEKI, S.: *A büntetés kiszabása. Enyhítő és súlyosító körülmények.* (Die Strafzumessung. Mildernde und erschwerende Umstände.) pp. 66—67.

[64] Mit Recht macht Bruns auf dessen Gefahr aufmerksam. BRUNS, S. H.-J.: *Strafzumessungsrecht. Allgemeiner Teil.* Köln, Berlin, Bonn, München, Karl Heymanns Verlag K. G., 1967. p. 39.

[65] VISKI, L.: *Büntetőpolitika és büntető törvényhozás.* (Strafpolitik und Strafgesetzgebung) Magyar Jog, 1960, p. 66.

[66] Székely meinte, daß darin die Unterscheidung der Gefährdung des Rechtsgutes und der Schädigung des Rechtsgutes erscheint, und kam zum Schluß, daß die Gesellschaftsgefährlichkeit der Straftat kleiner oder größer sein kann, als der zugefügte Schaden. Er brachte die Gesellschaftsgefährlichkeit mit dem „Verteidigungsprinzip", den verursachten Schaden mit dem „Vergeltungsprinzip" in Zusammenhang. SZÉKELY, S. J.: *A bűncselekménnyel okozott sérelem.* (Der mit der Straftat verursachte Schaden.) p. 262.

[67] VISKI, L.: *Tézisek a bűncselekményfogalom felépítéséhez.* (Thesen zum Aufbau des Verbrechensbegriffs) p. 387.

1961 von der „Persönlichkeit des Täters"; seit dem StGB v.J. 1961 aber enthält das Gesetz eine Bestimmung über „die Gesellschaftsgefährlichkeit des Täters".

Zur Zeit der Vorbereitung des StGB v.J. 1961 wurde der Begriff der persönlichen Gesellschaftsgefährlichkeit von VISKI und ANDRÁS SZABÓ angegriffen, indem sie verlangten, daß die Einstellung des Täters auch weiterhin im Rahmen der Schuld, in dem Momenten des Täterbewußtseins untersucht werde."[68] VISKI schlug vor, daß der Begriff der persönlichen Gesellschaftsgefährlichkeit — wie ein Element der kriminologischen Prognose, zu dessen Feststellung die kriminologischen Erforschungen genügende Aufklärung zu bieten nicht imstande sind, — durch den Begriff des „Grades der Erziehbarkeit der zu verurteilenden Person" ersetzt werde. Als Begründung bemerkte er: „das ist kein prognostisches Urteil, weil es nur solche Tatsachen, die sich in der Vergangenheit abspielten, bzw. zur Zeit der Begehung und der Beurteilung gegebene Umstände berücksichtigt.[69] Gegen die „ausdrückliche Erwähnung" der Persönlichkeit des Täters äußerte sich auch SCHULTHEISZ.[70]

Darin hatte BÓCZ gegen VISKI recht, daß „der Grad der Erziehbarkeit" um kein Haar besser ist, als die Persönlichkeit oder Gesellschaftsgefährlichkeit des Täters. Noch mehr hatte er recht, da er meinte, daß die Theorie die Erklärung des Begriffsinhaltes schuldig blieb. Der Vorschlag von BÓCZ ging jedoch über die Kritik von VISKI hinaus und schlug vor, mit der Aufnahme der Gesellschaftsgefährlichkeit des Täters in das Gesetz zusammen, daß die separate Beurteilung der Schuld weggelassen werde, indem er meinte, daß die persönliche Gesellschaftsgefährlichkeit die Zurechnungsfähigkeit voraussetzt, die Schuld der persönlichen Gesellschaftsgefährlichkeit entwächst, das ist ja die Ursache der schuldhaften Handlung, so ist die separate Erwähnung der Schuld überflüssig. Nach BÓCZ stellt die persönliche Gesellschaftsgefährlichkeit einen breiteren Begriff dar, der das Subjekt und die subjektive Seite in eine Einheit umfaßt. Als Schlußfolgerung schlug er vor, daß nur die Gesellschaftsgefährlichkeit der Straftat und ihrer Täter von den Strafzumessungsumständen im Gesetz erwähnt werden.[71] Der Einfall von BÓCZ hat einen Anhänger unter den Autoren des Strafrechtes geworben. DEMETER hat einige Jahre später geschrieben, daß die Schuld keine besondere Kategorie neben der persönlichen Gesellschaftsgefährlichkeit bedeutet, „die Schuld (Vorsatz und Fahrlässigkeit) gehört ja zur subjektiven Seite".[72]

[68] SZABÓ, A.—VISKI, L.: *A „társadalomvédelem" kriminálpolitikai elmélete.* (Die kriminalpolitische Theorie des „Gesellschaftschutzes".) Jogtudományi Közlöny, 1960. p. 162.

[69] VISKI, L.: *Büntetőpolitika és büntető törvényhozás.* (Strafpolitik und Strafgesetzgebung.) Um konsequent zu sein, hätte Viski auch die Zwangsheilbehandlung vom Strafrecht hinausfegen müssen. Warum wäre die Prognose nur im Falle der Geisteskranken möglich?

[70] Damit entfernte er sich auch vom Täterstrafrecht, das er 1949 noch vertrat! S. SCHULTHEISZ, S.: *Az új büntető törvénykönyv tervezetének általános részéről.* (Über den allgemeinen Teil des Entwurfs des neuen Strafgesetzbuches.) Jogtudományi Közlöny, 1960. p. 659.

[71] BÓCZ E.: *Észrevételek a büntető törvénykönyv tervezetének általános részéhez.* (Bemerkungen zum allgemeinen Teil des Entwurfes des Strafgesetzbuches.) Magyar Jog, 1961. p. 6.

[72] DEMETER, V.: *A súlyosító és enyhítő körülmények a bírói gyakorlatban.* (Die erschwerenden und mildernden Umstände in der Rechtsprechung.) p. 291.

Es ist nicht schwer die Vorgängerin dieser Auffassungen in einer früheren Schrift von HUSZÁR zu erkennen, die in den Grundsätzen des StGA die Verwirklichung des „Täterstrafrechtes" feierte, in dem die auf die Gesellschaft fallende Gefahr zum dezisiven Faktor wird, und „die in der Person des Täters vorhandene Schuld und andere Umstände ... nur dann unter Beurteilung fallen, wenn man aus diesen für die bei dem Täter vorliegende Gemeingefährlichkeit, als die Zukunft betreffendes Werturteil, Folgerungen ziehen kann."[73]

Was noch die Vorschläge zu den Strafzumessungsumständen betrifft, ist es offensichtlich, daß kein Platz mehr für die „anderen" Umstände bei BÓCZ geblieben ist. Dieselbe Idee ist im Zuge der Vorbereitung des neuen Kodex bei SZÉKELY zurückgekehrt, mit dem Unterschied jedoch, daß er die Schuld von den Strafzumessungsumständen nicht verbannen wollte.[74]

Die Frage blieb ansonsten durchgehend strittig, was wir unter persönlicher Gesellschaftsgefährlichkeit verstehen sollen.

Die aus der Persönlichkeit des Täters auf die Gesellschaft fallende Gefahr ist zuerst im StGA als ein Strafzumessungsumstand erschienen.

Die wissenschaftlichen Veröffentlichungen die das StGA zum Gegenstand hatten, gaben diesem Begriff ziemlich verschiedene Auslegungen. KÁDÁR hob in seinem Kommentar zum StGA vor allen Dingen das Verhältnis des Täters zur Arbeit hervor.[75] SZÉKELY nannte die Arbeit des Angeklagten, sein Verhältnis zur Gesellschaft, zu seiner Klasse[76] andernorts die schadhafte Eigenschaft, feindliche Einstellung, Charakterschwäche, morale Mängel die persönliche Gesellschaftsgefährlichkeit des Täters.[77]

In den 50er Jahren hat man praktisch als bestimmenden Faktor der persönlichen Gesellschaftsgefährlichkeit die Klassenzugehörigkeit betrachtet. Nach OLTI „ist die Gesellschaftsgefährlichkeit eines proletarischen Täters im allgemeinen anders, als die eines dieselbe Straftat begehenden Kapitalisten, Kulaks oder beliebigen Verlusttragenden des alten Systems".[78] Diese Anschauung hat die Persönlichkeit des Täters in

[73] HUSZÁR I.: *A magyar szocialista büntetőjog büntetésfogalma.* (Strafbegriff des ungarischen sozialistischen Rechts.) Jogtudományi Közlöny 1950. p. 384.

[74] SZÉKELY J.: *Enyhítő és súlyosító körülmények.* (Erschwerende und mildernde Umstände.) Magyar Jog, 1977. pp. 796—798.

[75] KÁDÁR, M.: *A büntetőtörvénykönyv általános része.* (Allgemeiner Teil des Strafgesetzbuches.) p. 141.

[76] SZÉKELY, J.: *Az előélet tisztázása és ennek jelentősége a büntetés kiszabásánál.* (Untersuchung des Vorlebens und deren Bedeutung bei der Strafzumessung.) p. 35.

[77] SZÉKELY, J.: *A bűncselekmény társadalomra veszélyességének vizsgálata és a büntetéskiszabás.* (Untersuchung der Gesellschaftsgefährlichkeit der Straftat und die Strafzumessung.) Magyar Jog, 1955. pp. 134.

[78] OLTI, V.: *A büntetőtárgyalás vezetése.* (Verhandlungsleitung in Strafsachen.) pp. 204—205. Aus dem Gesichtspunkt der persönlichen Gesellschaftsgefährlichkeit hat er den folgenden Umständen Bedeutung beigemessen: die Beschäftigung des Bruders des Beschuldigten, wer floh von den Familienmitgliedern des Beschuldigten nach dem Ausland, wer war von seinen Familienmitgliedern interniert, sogar auch der Frage, ob die Kinder des Beschuldigten begeisterte Jungpioniere sind, und dem Umstand, daß der Beschuldigte Blutspender des Roten Kreuzes ist! Gegen diese Auffassung s. SZABÓ I.: *Jogalkalmazás és*

den Mittelpunkt der Strafzumessung gestellt und diese als „entscheidenden Faktor der Strafzumessung" betrachtet. Die persönliche Gesellschaftsgefährlichkeit spielte auch in der Differenzierung zwischen dem Klassenfeind bzw. dem klassenfremden Element und den beirrten Werktätigen eine bedeutende Rolle.[79]

Nach dem Lehrbuch von KÁDÁR verbreitete sich die „reflex"-artige Auffassung der persönlichen Gesellschaftsgefährlichkeit. Die Thesen von Kádár sind: 1. das Subjekt ist bei der Begehung immer gesellschaftsgefährlich, 2. die Gesellschaftsgefährlichkeit des Täters stellt die Folge der Gesellschaftsgefährlichkeit der Straftat dar, 3. diese Gefährlichkeit kann nachträglich sogar bis zur Beurteilung aufhören.[80] Diese Auffassung ist bis heute wirksam. Nach VERMES z. B. „wird die Gesellschaftsgefährlichkeit des Täters in der begangenen Straftat manifestiert, die Folge der Gesellschaftsgefährlichkeit der Straftat ist also die Gesellschaftsgefährlichkeit des Täters".[81] Nach dem Motivenbericht des neuen StGB: „Die Gesellschaftsgefährlichkeit des Täters stellt die Folge der durch ihn verwirklichten Straftat dar. Der Täter ist also nicht im allgemeinen, sondern zufolge der Begehung der Straftat auf die Gesellschaft gefährlich."[82] In einer anderen Formulierung: „Die persönliche Gesellschaftsgefährlichkeit ist im Grunde genommen die Folge der Gesellschaftsgefährlichkeit der begangenen Straftat."[83]

Die garantielle Bestrebung dieser Auffassung ist die Anpassung des strafrechtlichen Verantwortungsgrades an das Maß der begangenen Straftat, mit anderen Worten, daß die strafrechtliche Verantwortung sich von der Gesellschaftsgefährlichkeit der Straftat nicht loslösen kann.

Wenn wir aber die Begriffe ernst nehmen, ist die Folge dieser Auffassung, daß die persönliche Gesellschaftsgefährlichkeit ist im Grunde genommen die Folge der selbständig zu sagen haben wird. Sie wiederholt bloß die in Bezug der Straftat vollbrachte Bewertung, jetzt schon auf die Person des Täters reflektiert. Eben aus

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szocialista törvényesség. (Rechtsanwendung und sozialistische Gesetzlichkeit. Magyar Jog, 1956. pp. 129—131.

[79] S. NON, GY.: *A Központi Vezetőség határozata után.* (Nach dem Beschluß des Zentralkomitees.) Magyar Jog, 1956. pp. 225—226.: VÁGÓ, T.: *A „megtévedtség" fogalma.* (Der Begriff „Irregeführt".) Magyar Jog, 1956. pp. 101—102.

VIDA F.: *Az ítélkezés eszmei színvonalának emelése és a perek osztálytartalmának vizsgálata.* (Erhöhung des ideologischen Niveaus der Strafrechtsprechung und die Untersuchung des Klasseninhalts der Prozesse.) Jogtudományi Közlöny, 1956. pp. 409—420.; VÁGÓ T.: *A büntető ítélkezés néhány időszerű kérdése.* (Einige aktuellen Fragen der Strafrechtsprechung.) Magyar Jog, 1962. pp. 6.—10.; SZÉNÁSI, G.: *Jogpolitikának időszerű kérdései.* (Aktuelle Fragen unserer Rechtspolitik.) Jogtudományi Közlöny, 1962. pp. 61—67.

[80] KÁDÁR, M.: *Magyar Büntetőjog. Általános rész.* (Ungarisches Strafrecht. Allgemeiner Teil.) p. 183.

[81] VERMES, M.: *A kriminológia alapkérdései.* (Grundfragen der Kriminologie.) Budapest, 1971. Akadémiai Kiadó.; VERMES, M.: *A bírói individualizáció a büntető joggyakorlatban.* (Die gerichtliche Individualisierung in der Strafrechtsprechung.) Jogtudományi Közlöny, 1972. pp. 1—6.

[82] KÁDÁR, M.—MOLDOVÁNYI, GY.: *Büntető Törvénykönyv.* (Strafgesetzbuch) p. 127.

[83] GYÖRGYI, K.: *A bűncselekmény büntetőjogi következményei.* (Die strafrechtlichen Folgen der Straftat.) p. 223.

diesem Grunde halten auch die Anhänger dieser Auffassung für zulässig, daß — neben der Betonung des grundlegenden und bestimmenden Zusammenhanges — auch andere Umstände die Gesellschaftsgefährlichkeit des Täters erhöhen können, bzw. vermindern.[84] Darauf weist auch der Motivenbericht des neuen StGB.[85]

Die andere Auffassung der persönlichen Gesellschaftsgefährlichkeit legt diesen Begriff als eine entscheidend prognostisches Urteil aus. Nach SCHULTHEISZ bedeutet die Gefährlichkeit der Person, daß wir bei einem Individuum mit größerer Wahrscheinlichkeit die Begehung einer Straftat erwarten können, als bei dem Durchschnitt der Menschen."[86] Diese Definition kehrt bei FÖLDVÁRI zurück. Nach seiner Ansicht: „Unter subjektiver Gesellschaftsgefährlichkeit verstehen wir einen solchen Zusammenhang der Vorstellungen, solche Denkweise einer gewißen Person, zufolge deren voraussichtlich ist, daß diese Person in der Zukunft die Interessen der Gesellschaft schädigendes, oder gefährdendes Verhalten bezeigen wird."[87] In prognostischem Sinn faßte auch VISKI die persönliche Gesellschaftsgefährlichkeit auf; darum hat er die Verwendung des Begriffes im Strafrecht verworfen.[88]

Schließlich sind auch solche Auffassungen bekannt, die durch die Untersuchung der Gesellschaftsgefährlichkeit des Täters seine morale Qualifikation angeben. So z. B. bedeutet nach MOLNÁR die persönliche Gesellschaftsgefährlichkeit die gesellschaftsfeindliche Einstellung des Täters.[89] Nach PATERA: „Unter subjektiver Gesellschaftsgefährlichkeit verstehen wir eine solche Persönlichkeitsstruktur, in deren Wertordnung die durch die Strafrechtsnormen geschützten, bestimmten, konkreten gesellschaftlichen Bedürfnisse, Interessen, Erfordernisse überhaupt keine, oder nur untergeordnete Rolle spielen."[90] Dieser Ansicht nähert auch die Auffassung von BÓCZ: „die gesellschaftsgefährliche Persönlichkeit: eine Person, die eine gesellschaftsgefährliche Tätigkeit ausübt."[91]

[84] KÁDÁR, M.: *A súlyosító körülmények.* (Die erschwerenden Umstände.) p. 134.; VERMES, M.: *A bírói individualizáció a büntető joggyakorlatban.* (Die gerichtliche Individualisierung in der Strafrechtsprechung.) p. 2.; GYÖRGYI, K.: *A bűncselekmény büntetőjogi következményei.* (Die strafrechtlichen Folgen der Straftat.) pp. 223.

[85] KÁDÁR, M.—MOLDOVÁNYI, GY.: *Büntető Törvénykönyv.* (Strafgesetzbuch) p. 127.

[86] SCHULTHEISZ, S.: *A büntetés kiszabása.* (Die Strafzumessung) p. 17.

[87] FÖLDVÁRI, J.: *Az egység és a halmazat határesetei a büntetőjogban.* (Grenzfragen der Tateinheit und Konkurrenz im Strafrecht.) p. 83. Ebenso FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) p. 241. Demgegenüber glauben wir nicht, daß es „keine objektive Gesellschaftsgefährlichkeit ohne subjektive Gesellschaftsgefährlichkeit gibt." So FÖLDVÁRI, J.: *Az egység és a halmazat határesetei a büntetőjogban.* (Grenzfragen der Tateinheit und Konkurrenz im Strafrecht.) p. 84.

[88] VISKI, L.: *Büntetőpolitika és büntető törvényhozás.* (Strafpolitik und Strafgesetzgebung.) p. 67.

[89] MOLNÁR, J.: *A büntetést meghatározó tényezők.* (Die bestimmenden Faktoren der Strafe.) p. 28.

[90] PATERA, A.: *A visszaeső bűnözők társadalomra veszélyességének felderítéséről.* (Über die Aufklärung der Gesellschaftsgefährlichkeit der Rückfälligen.) Belügyi Szemle, 1971/7. p. 39.; BODNÁR, Ö.: *Gondolatok a személyi társadalomra veszélyességhez.* (Gedanken zur persönlichen Gesellschaftsgefährlichkeit.) Magyar Jog, 1972. pp. 229—231.

[91] BÓCZ E.: *A személyi társadalomra veszélyesség fogalma, összetevői és értékelése a büntetőjogban.* (Begriff, Komponenten und Bewertung der persönlichen Gesellschaftsgefährlichkeit im Strafrecht.) Kandidaturthesen, Budapest, 1975. p. 11.

Die reflexartige Auffassung der Gesellschaftsgefährlichkeit des Täters ist deswegen mangelhaft, weil sie die Verantwortung durch die künstliche Einengung des Begriffes der persönlichen Gesellschaftsgefährlichkeit einschränken will, obgleich die persönliche Gesellschaftsgefährlichkeit und die Bedeutung die im Zuge der Strafverfolgung dieser zukommt, zwei verschiedene Dinge sind.[92]

Die Ansicht, wonach die persönliche Gesellschaftsgefährlichkeit eine morale Momentaufnahme ist, qualifiziert nur die Gegenwart und gibt keine Antwort auf die Frage, welches Verhalten seitens des Täters für die Zukunft droht, und dann ist ja die Verwendung des Begriffes der Gefährlichkeit unbegründet.

Als richtig können wir die prognostische Auffassung der persönlichen Gesellschaftsgefährlichkeit betrachten, undzwar damit, daß der Grund dieser Folgerung in erster Reihe im früheren Verhalten des Täters zu suchen ist, und im Bewußtsein dessen, daß wir für die Zukunft nur beschränkt geltende Erklärungen geben können, wie auch nur beschränkte Möglichkeiten zur Aufdeckung der persönlichen Gesellschaftsgefährlichkeit im Strafverfahren vorhanden sind. FÖLDVÁRI schrieb über die subjektive Gesellschaftsgefährlichkeit," daß deren Berücksichtigung eine sehr tiefgreifende Persönlichkeitsprüfung voraussetzt."[93] Richtig stellt Gabriella RASKÓ fest, daß „die Persönlichkeitsuntersuchung nur durch einen Fachmann: Psychiater oder Psychologe durchgeführt werden kann, so ist sie als eine Sachverständigenuntersuchung zu qualifizieren."[94] Wir müssen auch mit der Meinung von Frau János ZSIGA einverstanden sein, nach der „die Möglichkeiten einer Persönlichkeitsuntersuchung von genügender Intensität und Wirksamkeit ziemlich begrenzt sind,"[95] wie auch die Mahnung von TOKAJI ernst zu nehmen ist: „je mehr wir uns von der Straftat entfernen, sowie von der Persönlichkeitsstörung, die darin realisiert wird, und von den nachträglichen Äußerungen, die die begangene Handlung betreffen, — in der Richtung der Untersuchung der Persönlichkeit des Täters und des Entwicklungsvorganges der Persönlichkeit mit prognostischem Ziel, werden wir solche Ergebnisse erzielen, die im Mißverhältnis wenigstens zur Arbeitsaufwendung, meistens aber auch sonst von abnehmendem Wert sind."[96] Die heute verwendeten Prognosen gründen sich mehr auf Lebenserfahrungen, Intuition, als auf ein

[92] Überzeugend wird es bewiesen in: BÓCZ, E.: *A személyi társadalomra veszélyesség fogalma, összetevői és értékelése a büntetőjogban.* (Begriff, Komponenten und Bewertung der persönlichen Gesellschaftsgefährlichkeit im Strafrecht.)

[93] FÖLDVÁRI, J.: *A büntetés tana.* (Die Straflehre) p. 242.; s. noch RÁCZ, GY.: *A büntetéskiszabás elvi kérdései.* (Grundsätzliche Fragen der Strafzumessung.) p. 202.

[94] RASKÓ G.: *A személyiség feltárása a nyomozás során.* (Aufdeckung der Persönlichkeit im Zuge der Ermittlung.) Belügyi Szemle, 1971/12. p. 94.

[95] FRAU ZSIGA J.: *A bűnelkövetéshez kapcsolódó személyiségi sajátosságok büntetőjogi megítélése.* (Strafrechtliche Bewertung der sich an die Straftatbegehung knüpfenden Persönlichkeitsmerkmale.) Magyar Jog, 1974. p. 519.

[96] TOKAJI, G.: *Adalékok a bűncselekményfogalom felépítéséhez.* (Beiträge zum Aufbau des Verbrechensbegriffes.) p. 56.

wissenschaftlich begründetes Verfahren.[97] Das Gericht ist imstande festzustellen, wie die Begehung der Straftat mit der Lebensführung des Täters zusammenhängt, mit anderen Worten: wieweit die Straftat die Offenbarung der mehr oder weniger ausgestalteten Denkweise, Gewohnheiten, Wertordnung sei,[98] andererseits welche Wirkung von der Bestrafung auf das zukünftige Verhalten des Verurteilten zu erwarten ist.

Die persönliche Gesellschaftsgefährlichkeit ist von Anfang an ein mit der Schuld konkurrierender Begriff. Die Reformschulen haben an die Stelle der Schuld die Gefährlichkeit der Person gestellt, aber der Schuldbegriff trachtete auch sich an die neuen Erfordernisse anzupassen, so ist der Begriff der sogenannten Lebensführungsschuld entstanden.[99] VISKI versuchte die Konkurrenz zugunsten der Schuld aufzulösen. Die prognostischen Beziehungen der persönlichen Gesellschaftsgefährlichkeit als Wahrsagung vom Kreis der die strafrechtliche Verantwortung beeinflussenden Faktoren verbannand schrieb: „Was aber im Begriff der persönlichen Gesellschaftsgefährlichkeit keine Wahrsagung, keine Prognose, sondern Diagnose, d.i. die Prüfung der sich in der konkreten Straftat manifestierenden Einstellung bedeutet, deren Beurteilung kann in richtiger Weise nur bis zu solchem Maße erfolgen, in dem diese Einstellung in der Straftat durch die Momente des Täterbewußtseins (so auch durch die Absicht und das Motiv) tatsächlich zum Ausdruck gekommen ist."[100] Nach BÓCZ ist andererseits die Separathaltung der Schuld daher unbegründet, weil diese aus der persönlichen Gesellschaftsgefährlichkeit hervorwächst, die die Ursache des Verbrechens darstellt.[101] Andere aber bekennen sich für das Umgekehrte dessen, indem sie meinen: wer schuldhaft eine gesellschaftsgefährliche Straftat begeht, „ist eben zufolge seiner Schuld, seines Bewußtseinsinhaltes ... aktuell auch in seiner Person gesellschaftsgefährlich."[102]

Wenn wir die Schuld mit der Gesellschaftsgefährlichkeit des Täters identifizieren, oder die Gesellschaftsgefährlichkeit in der Schuld, bzw. die Schuld in der

[97] VIGH J.: *Kauzalitás, determináció és prognózis a kriminológiában.* (Kausalität, Determination und Prognose in der Kriminologie.) Thesen einer Doktorarbeit. Budapest, 1975. pp. 23—26. Er ist der Meinung, daß „das Niveau der Humanwissenschaften und der elektronischen Datenverarbeitung die Ausarbeitung der mit großer Wahrscheinlichkeit geltenden kriminologischen Prognosen ermöglichen." Zu den rechtlichen Gesichtspunkten s. KIRÁLY, T.: *Büntetőítélet a jog határán.* (Strafurteil an der Grenze des Rechts.) p. 279.

[98] Darauf gründen sich die Bestrebungen zur Typisierung der Täter. S. SIMOR P.: *A büntetés kiszabása.* (Die Strafzumessung) In: V. Kongreß des Ungarischen Juristenverbands, Siófok, 1958. 7—19. Mai 1958. Budapest, 1959 pp. 231. ff.; BAKÓCZI A.: *Az élet elleni bűnözés tipizálási és osztályozási kérdései.* (Fragen der Typisierung und Klassifizierung der Verbrechen gegen das Leben.) In: Studien zur Kriminologie und Kriminalistik, Bd. XV. Budapest, Közgazdasági és Jogi Könyvkiadó, 1978. pp. 5—79.; GÖNCZÖL K.: *A visszaeső bűnelkövetők tipológiája.* (Typologie der rückfälligen Täter.) Kandidaturthesen, Budapest, 1978.

[99] VISKI, L.: *Szándékosság és társadalomra veszélyesség.* (Vorsätzlichkeit und Gesellschaftsgefährlichkeit.) Budapest, Közgazdasági és Jogi Könyvkiadó, 1959. pp. 25., 202—204. und 223.

[100] VISKI, L.: *Büntetőpolitika és büntető törvényhozás.* (Strafpolitik und Strafgesetzgebung.) p. 67.

[101] BÓCZ, E.: *Észrevételek a büntető törvénykönyv tervezetének általános részéhez.* (Bemerkungen zum allgemeinen Teil des Entwurfes des Strafgesetzbuches.) pp. 7—8.

[102] KÁDÁR, M.: *A súlyosító körülmények.* (Die erschwerenden Umstände) p. 134.

Gesellschaftsgefährlichkeit des Täters auflösen wollen, wird die Separathaltung der beiden Begriffe gewiß nicht notwendig sein. Das StGB andererseits erwähnt diese zwei Umstände unter den Strafzumessungsumständen abgesondert und die Bedeutung dieser Regelung wird auch durch die Klassifikation geschwächt, die die Schuld und die persönliche Gesellschaftsgefährlichkeit in der Kategorie der „Schuldumstände subjektiven Charakters" zusammenschmelzt.

Die besondere Hervorhebung des Schuldbegriffes ist nicht daher notwendig, damit dieser Hilfsbeweise zur Feststellung der persönlichen Gesellschaftsgefährlichkeit biete, sondern weil die schuldhaft begangene gesellschaftsgefährliche Straftat die Grundlage der strafrechtlichen Verantwortung, und die wichtigste Determinante des Maßes dieser Verantwortung bildet. Diese Grundlage und Determinante fordert nicht von dem Lebensweg des Individuums, sondern von der begangenen Straftat Rechenschaft. Das sich an die konkrete Straftat knüpfende psychische Verhältnis[103] soll nicht im Rahmen der Gesellschaftsgefährlichkeit des Täters, sondern als Grad der Schuld beurteilt werden. Die Schuld stellt nur eine partikulare Erscheinung der Gesamtpersönlichkeit dar, die Strafe gegenüber berührt die ganze Persönlichkeit. Darum hat man aus dem Gesichtspunkt der voraussichtlichen Wirkung der Strafe auch die persönliche Gesellschaftsgefährlichkeit des Täters zu berücksichtigen. Das Gesetz läßt dies jedoch nur in den durch die Straftat bestimmten Rahmen zu, weil — wenn es nicht so erfolgen würde — gäbe es keine Anpassung zwischen der Strafe und der schuldhaft begangenen gesellschaftsgefährlichen Handlung, die aber das Gesetz erfordert.

Принципы назначения наказания

К. Дьёрдьи

Статья посвящена вопросам регулирования законом принципов назначения наказаний в венгерском уголовном праве.

Принципы назначения наказаний впервые в венгерском уголовном праве были регулированы законом №II/1950 г. Данное регулирование оправдало себя на практике, поэтому с небольшими изменениями его позаимствовал УК 1961 г., а также УК 1978 г. Настоящее регулирование состоит из трех существенных элементов. Первый: ссылка на законные пределы наказания; второй: учет цели наказания; третий: учет смягчающих и отягчающих обстоятельств, среди которых закон подчеркивает общественную опасность совершителя и преступления и степень виновности. Закрепление в законе принципов назначения наказаний дает простор судебному рассуждению. В то же время деятельность по назначению наказаний представляет собой и применение права — применение предусмотренных законом принципов назначенуя наказаний. На этом основывается позиция судебной практики, по которой назначение наказания, нарушающее принципы назначения наказаний, означает неправильное применение материально-правовой нормы, которое может быть обжаловано в суде второй инстанции.

[103] Viski, L.: *Szándékosság és társadalomra veszélyesség.* (Vorsätzlichkeit und Gesellschaftsgefährlichkeit.) p. 24.

В связи с обстоятельствами назначения наказаний автор подвергает критике понятийное определение, существующее в венгерской специальной литературе и правовой практике, которым эти обстоятельства называются «обстоятельствами виновности». Обстоятельством назначения наказания является всякое такое обстоятельство, которое — в рамках закона — учитывается судом при определении вида и меры применяемого наказания и способа его исполнения.

Говоря об обстоятельствах назначения наказаний автор устанавливает, что преимущественное значение имеет общественная опасность преступления. Однако мера наказания, соответствующая общественной опасности преступления, не означает зафиксированной меры, а только лимит. Оценка степени виновности, общественной опасности совершителя и иных смягчающих и отягчающих обстоятельств может иметь место лишь в пределах, определенных общественной опасностью преступления. В области назначения наказания общественная опасность преступления является таким пунктом сопоставления, по сравнению с которым другие обстоятельства назначения наказания могут быть оценены смягчающими или отягчающими.

В связи с группировкой обстоятельств назначения наказаний автор обращает внимание на то, что она имеет значение как в правильном определении круьа таких обстоятельств, так и в избежании двойной оценки обстоятельств состава, даже обстоятельств назначения наказания.

Среди обстоятельств назначения наказаний автор и особо занимается понятияму виновности и общественной опасности личности и их соотношением. Автор устанавливает, что эти два понятия конкурируют друг с другом в теории и практике. По мнению автора общественная опасность личности является прогностическим понятием и это означает, что в будущем какое поведение ожидается от совершителя, каковы шансы применяемой санкции в отношении воздействия на его поведение. Оценка общественной опасности личности совершителя, однако, может быть осуществлена только в пределах, определенных виновным общественно опасным деянием.

Les principes de l'infliction de la peine

K. Györgyi

L'étude s'occupe des questions en connexion avec la réglementation légale des principes de l'infliction de la peine dans le droit pénal hongrois.

Les principes de l'infliction de la peine ont été réglementés pour la première fois dans le droit pénal hongrois par la Loi № II de l'an 1950. Cette réglementation a soutenu l'épreuve dans la pratique ainsi le Code Pénal hongrois de l'an 1961 et celui de l'an 1978 l'ont emprunté aussi — avec des modifications de moindre importance. Cette disposition se compose de trois éléments essentiels. Le premier en est: le renvoi aux cadres légaux de la peine. Le deuxième en est: ne pas perdre de vue le but de la peine. Le troisième en est: prendre en considération des circonstances atténuantes et aggravantes parmi desquelles la loi met en relief le caractère dangereux de l'infraction et celui de l'auteur de l'infraction emportant à la société et le degré de la culpabilité. La fixation légale des principes de l'infliction de la peine assure un domaine convenable à l'appréciation du tribunal. L'activité de l'infliction de la peine signifie en même temps une application de droit, l'application des principes de l'infliction de la peine par voie légale. Est basé sur celle-ci le point de vue de la pratique judiciaire à savoir que l'infliction de la peine heurtant les principes de l'infliction de la peine signifie l'application incorrecte de la règle juridique matérielle laquelle situation peut être remédiée par le tribunal de deuxième instance.

En connexion avec les circonstances de l'infliction de la peine l'étude adresse une critique à la désignation notionnelle existant dans la littérature juridique et dans la pratique juridique hongroises laquelle appelle ces circonstances en tant que «circonstances de culpabilité». Toutes circonstances peuvent être considérées en tant que circonstances de l'infliction de la peine lesquelles sont prises en considération par le tribunal — das les cadres de la loi — lors de la détermination du genre, de la mesure et du moyen de l'exécution de la peine à appliquer.

En mentionnant des circonstances de l'infliction de la peine, l'étude constate qu'une importance primordiale est signifiée par le caractère dangereux de l'infraction emportant à la société. La mesure de la

peine convenable au caractère dangereux de l'infraction à la société ne signifie cependant pas une mesure fixée mais seulement une certaine latitude. L'appréciation du degré de la culpabilité et du caractère dangereux de l'auteur de l'infraction emportant à la société ainsi que des autres circonstances aggravantes et atténuantes peut avoir lieu dans des cadres déterminés par le caractère dangereux de l'infraction emportant à la société. Dans le cadre de l'infliction de la peine, le caractère dangereux de l'infraction emportant à la société est un tel point de rapport au fur et à mesure duquel pourront être appréciées les autres circonstances de l'infliction de la peine en tant que circonstances atténuantes respectivement aggravantes.

En connexion avec le groupement de la circonstance de l'infliction de la peine, l'étude invite l'attention à remarquer au fait à savoir qu'il a de portée soit dans la désignation correcte du cadre de telles circonstances soit à l'évitement de l'appréciation répétée des circonstances de l'exposé des faits soit même des circonstances de l'infliction de la peine.

Parmi des circonstances de l'infliction de la peine, l'étude traite à part la notion de la culpabilité et du caractère dangereux de l'auteur de l'infraction emportant à la société, ainsi que, avec les rapports d'échange. Elle constate que ces deux notions font la concurrence soit dans la théorie soit dans la pratique. Selon le point de vue de l'étude le caractère dangereux personnel emportant à la société est une notion pronostique ce qui signifie que de la part de l'auteur de l'infraction quelle sorte de comportement est-elle à envisager et quelles sont les chances de la sanction à appliquer à influencer son comportement. Cependant l'appréciation du caractère dangereux personnel de l'auteur de l'infraction emportant à la société ne pourra avoir lieu que dans des cadres déterminés par l'acte emportant danger à la société commis comme coupable.

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Informationes

Die Stellung der Wirtschaftsassoziationen im System der ungarischen Wirtschaftsorgane

1. Die Wirtschaftsassoziationen sind Institutionen der Volkswirtschaft, die mit beinahe sämtlichen Elementen des Wirtschaftslenkungssystems und des Wirtschaftsmechanismus in engster Verbindung stehen. Irgendwelche Formen der Assoziationen, (eher die landwirtschaftlichen Produktionsgenossenschaften und weniger die Assoziationen der staatlicher Unternehmer) sind in der Wirtschaft sämtlicher sozialistischen Länder anzutreffen. Die speziellen Züge der Wirtschaftslenkungssysteme der einzelnen Länder machen die Errichtung spezieller Institutionen und Kooperationsformen notwendig, demgemäß sind die Assoziationen, infolge ihrer engen Verbindung mit dem Wirtschaftsmechanismus, sozusagen konzentrierte Träger des Wirtschaftslenkungssystems der betreffenden Staaten.

Die grundlegenden Charakterzüge des ungarischen Wirtschaftslenkungssystems sind dem ungarischen Leser bekannt, deshalb will ich hier nur zwei, aus dem Gesichtspunkt der Entstehung und Entwicklung der Assoziationen bestimmende Spezifika hervorheben. Das eine ist, daß zufolge der Reform des Wirtschaftsmechanismus im Jahr 1968 die wirtschaftliche Selbständigkeit der Wirtschaftsorgane — staatliche Unternehmen und Genossenschaften — in bedeutendem Maß zunahm. Diese größere Selbständigkeit machte es notwendig, daß auch die Wirtschaftslenkung und die rechtliche Regelung die Fortsetzung der wirtschaftenden und unternehmenden Tätigkeit dieser Organe zwischen neuen Organisationsrahmen und auf einer breiteren Sphäre sicherstelle und ermögliche. Der andere wichtige Charakterzug der Wirtschaftsreform war, daß das System der auf die Unternehmen aufgegliederten obligatorischen Plananweisungen eingestellt wurde. Durch die Aufhebung dieses Systems verringerte sich im wesentlichen die koordinative Tätigkeit einer Art des zentralen Plans gegenüber den Wirtschaftsorganen, und so mußte diese Koordination auf die Ebene der effektiven Entscheidungen nämlich auf die Unternehmenebene übertragen werden.

Bezüglich der Realisierung des organisatorischen Rahmens dieser Aufgaben entstanden im Zuge der Vorbereitung der Reforme keine endgültige Beschlüsse. Der Beschluß der Ungarischen Sozialistischen Arbeiterpartei vom Jahre 1966, die die Grundprinzipien der Reform niederlegte, enthielt nur ziemlich unbestimmte Hinweise auf die Notwendigkeit solcher Kooperationsformen, die geeignet erschienen den organisatorischen Rahmen der erwähnten Wirtschafts- und Koordinationstätigkeiten zu bilden. Die in 1968 im Kraft getretene Rechtsnormen ermöglichten aber bereits ausdrücklich die Errichtung von Assoziationen zur Erfüllung dieser Aufgaben.

2. In den vergangenen Jahren bildete sich in Ungarn eine ziemlich ausgeprägte Theorie der Assoziationen heraus, die hinsichtlich der Entwicklung der rechtlichen Regelung nicht unwirksam blieb, und auch nicht unwirksam bleiben konnte. Den Ausgangspunkt dieser Theorie bildet, daß die Assoziation eine spezielle Kooperationsbeziehung Warencharakters zwischen den Wirtschaftsorganen ist, die in jedem Fall eine komplexe Einheit von rechtlichen und wirtschaftlichen Elementen darstellt. Die Beachtung der rechtlichen und wirtschaftlichen Spezifika ist sowohl bei der Untersuchung der Regelung, als auch ihrer Funktionierung unumgänglich notwendig.

Von rechtlicher Seite ist das grundlegende Charakteristikum der Assoziationen, daß sie eine durch Verträge aufstehende Kooperationsbeziehung verkörpern. Im Gegensatz aber zu anderen mit Namen versehenen Verträgen die zwar auch Kooperationselemente aufweisen —, wird die

Kooperation zum bestimmenden Faktor des Charakters des Vertrags, macht sich von den konkreten Warenaustauschbeziehungen los, das primäre Objekt der Leistung ist die Kooperation selbst. Aus dem Charakter des Vertrags folgt es, daß die Assoziation in allen Fällen eine in Gleichordnung stehende Beziehung ausdrückt. Diese Gleichordnung ist in der Beziehung der an der Assoziation Beteiligten untereinander geltend, da die Assoziation selbst unter der Leitung der Beteiligten steht, sie entwickelt denen unterstellt ihre Tätigkeit. Die Assoziation kann also nie zum Leitungsorgan der Teilnehmenden werden, da sie einerseits nicht im Wege der öffentlichen Gewalt, sondern durch Beschluß der Beteiligten zustande kommt, andererseits sind die Beziehungen der Gleich bzw. Unterordnung gerade umgekehrt, als bei den Lenkungsorganen.

Den ökonomischen Inhalt der Assoziationen stellen die beiden vorhin erwähnten grundlegenden Funktionen der Assoziationen, die Koordination und die wirtschaftliche Unternehmung dar.

Die Koordination bedeutet die Abstimmung und Harmonisierung der Tätigkeiten, das dort notwendig ist, wo wir voneinander mehr oder minder unabhängige Funktionen nach einem gemeinsamen Ziel lenken wollen. Die Volkswirtschaft besteht aus Wirtschaftseinheiten, die ihre Aufgaben voneinander gesondert jedoch in Verbindung miteinander, und einander ergänzend versehen. Die in breitestem Sinne verstandene Koordination der Tätigkeit der Wirtschaftsorgane bildet einer Teil auch der wirtschaftslenkenden Funktion des Staates. Die Koordination ist aber ein Teil auch der Selbstregelungstätigkeit der Unternehmen. Die Kooperation unter den Unternehmen kann über zahlreichen Vertragsformen ausgebaut werden, zur Koordination wird aber die Kooperation nur bei den Assoziationen, wo die Kooperation organisationsmäßige Formen annimmt, selbständige Organisations- und Geschäftsführungsformen erhält. Diese Tätigkeit der Assoziationen richtet sich immer „nach innen", sie zielt auf die Beteiligten an der Assoziation.

Die wirtschaftliche Unternehmung ist ein traditionelles Objekt der Tätigkeit der Assoziationen, dessen Charakterzug ist, daß die Beteiligten ihre Tätigkeit nicht gesondert, sondern gemeinsam entwickeln. Das erfordert die Vereinigung einzelner Funktionen der Mitglieder, oder eines Teils ihrer Mittel. Diese Vereinigung bringt auch das gemeinsame Risiko mit sich und bedeutet auch, daß die Mitglieder auch an dem Gewinn oder an dem Verlust gemeinsam beteiligt sind.

Die Koordination und die wirtschaftliche Unternehmung ist in irgend einer Form das Element sämtlicher Assoziationen, da einesteils die gemeinsame wirtschaftliche Unternehmung die Abstimmung wenigstens dieser Tätigkeiten der Beteiligten notwendig macht, andererseits ist auch das ein primäres Ziel der Koordination im Rahmen der Assoziation die wirtschaftliche Unternehmungstätigkeit der Beteiligten zufördern. Das Volumen dieser beiden Elemente in der Assoziationstätigkeit, ihr Verhältnis zueinander bildet die grundlegende Differenz zwischen den einzelnen Assoziationen.

Neben den beiden erwähnten Hauptfunktionen können noch die Funktionen im Zusammenhang mit der Strömung der Mittel, die Konzentrations-Integrationsfunktion, sowie die die Unternehmen- und Unternehmenleitungsstruktur modifizierende Funktion erwähnt werden. Diese Funktionen kommen aber meist den beiden Hauptfunktionen untergeordnet zur Geltung.

3. Bei der Einführung der Wirtschaftslenkungsreform konnte sich noch kein prinzipiell einheitliches, wohl aufgebautes Assoziationsrecht herausbilden, obzwar die rechtliche Regelung bestrebt war, die Gründung der Assoziationen zu fördern. Die einfachste Lösung war jene Formen anzuwenden, die bereits fertig dastanden — wenn auch nicht nach dem Maß der sozialistischen Unternehmen geschnitten. So wurde es möglich, daß die Unternehmen, den Regeln des ZGB entsprechend, *zivilrechtliche Gesellschaft* gründen. Diese waren Assoziationsformen ohne Rechtspersönlichkeit mit Vermögensvereinigung, deren den staatsbürgerlichen Verhältnissen angepaßte Regeln sich eher zurückhaltend, als präferierend auswirkten. Als *gemeinsames Unternehmenkonstruktion* konstituierte die rechtliche Regelung zwei Institutionen des alten Handelsrechts aus der bürgerlichen Gesellschaftsordnung, die Aktiengesellschaft und die GmbH. (Die Regeln der AG sind in einem Gesetz vom Jahr 1875 enthalten, während die Regeln der GmbH. aus 1930 stammen). Als neue Assoziationsform wurde durch die rechtliche Regelung die *Vereinigung* als koordinative Assoziation ohne Rechtspersönlichkeit eingeführt, deren inhaltliche Regeln aber nicht mit der erwünschten

Ausführlichkeit ausgearbeitet wurden. Neben diesen blieben auch weiterhin die speziellen genossenschaftlichen Assoziationsformen stehen. Diese „Hals über Kopf" durchgeführte Regelung hatte zur Folge, daß aus der den Assoziationen zugedachten beiden Hauptfunktionen nur die gemeinsame Wirtschaftung realisiert werden konnte, da die Mehrzahl der Formen eine Vermögenvereinigung erwünscht und die Koordination nur über dieselbe zur Geltung kommen konnte. Es stimmt zwar, daß die Vereinigungen ausgesprochen mit koordinativem Zweck ins Leben gerufen wurden, ihre Tätigkeit deformierte sich aber bald beträchtlich. Der Grund dafür war in erster Linie die Großzügigkeit der Regelung, andererseits aber, daß ein großer Teil der Vereinigungen aus den Trusts umgestaltet wurden. Dementsprechend wahrten sie in ihrer Tätigkeit zahlreiche Charakteristiken der Trusts, wozu ihnen auch die Ministerien Unterstützung boten. Das Ergebnis war, daß die Vereinigungen als Trust zu schwach, als Assoziationen zu stark geworden sind.

Die rechtliche Regelung der Assoziationen hatte seither mehrere Etappen, unser derzeitiges Recht der Assoziationen wird durch die Normen aus 1978 geregelt, und zwar auf mehreren Ebenen. Der Ausgangspunkt der Regelung ist das ZGB, das aus seinem Character folgend selbstredend bloß die bürgerrechtlichen Bezüge des Assoziationen regelt.Die zweite Ebene der Regelung — durch Gesetzesverordnung — ist bereits eine komplexe Regelung — da hier auch über einzelnen finanziellen, staatsverwaltungs- und arbeitsrechtlichen Fragen der Assoziationen verfügt wird. Die Teilvorschriften sind dann in den Durchführungsverordnungen der Ministerien des Finanz, Arbeits-, und Außenhandelswesen enthalten. Als erstes Charakteristikum der Regelung und als ihr wichtigstes Verdienst kann also die rechtszweigliche *Komplexität* erwähnt werden. Eine andere wichtige Errungenschaft, wichtiges Ergebnis der neuen rechtlichen Regelung ist, daß als Ergebnis langwieriger Debatten die Sonderstellung der Regelung der genossenschaftlichen Assoziationen aufgehoben wurde, und es kam das einheitliche, für sämtliche Wirtschaftsorgane — staatliche Unternehmen und Genossenschaften — gleicherart geltende Recht der Assoziationen zustande. Drittens muß als sehr wichtiger Charakterzug des neuen Rechts der Assoziationen hervorgehoben werden, daß die Assoziationen koordinativen und wirtschaftenden Charakters bei jeder einzelnen Formation konsequent voneinander unterschieden werden, ihnen überlassend, ob sie als Rechtspersonen, oder als Assoziationen ohne Rechtspersönlichkeit funktionieren wollen.

Die Assoziationsform ohne Rechtspersönlichkeit, die *Wirtschaftsgesellschaft* ist im besonderen Teil des ZGB, unter den einzelnen Verträgen geregelt; diese Regelung faßt, entsprechend den früher erwähnten, zwei Grundkonstruktionen in sich. Teils ist es die traditionelle, auf eine gemeinsame wirtschaftliche Unternehmung gerichtete vermögensvereinende Assoziation, bei denen entscheidend ist, daß sich die Beteiligten zu eine gemeinsame wirtschaftliche oder eine auf ein gemeinsames wirtschaftliches Ziel gerichtete Tätigkeit vereinbaren, wobei die dazu nötigen materiellen Mittel zur gemeinsamen Verfügung gestellt werden. Andererseits ist es aber auch möglich, daß die Beteiligten die Assoziation zwecks Förderung ihrer wirtschaftlichen Interessen und zur Abstimmung ihrer darauf gerichteten gemeinsamen Tätigkeit errichten. In diesem Fall ist die Zurverfügungstellung der materiellen Mittel keine Vorbedingung der Abschließung des Vertrags mehr. Es ist natürlich auch möglich, daß ein Gesellschaftsvertrag die beiden erwähnten Aufgaben, die gemeinsame wirtschaftliche Tätigkeit und die Koordination gemeinsam enthält. Ein Mangel der rechtlichen Regelung ist, daß die Teilvorschriften über die Wirtschaftsgesellschaft im wesentlichen nur für die Gesellschaften wirtschaftenden Charakters angewendet werden können, bezüglich der koordinativen Gesellschaften beinhalten sie, außer der Definition, beinahe überhaupt keine Regeln. Der Grund dafür ist aber der Mangel an Erfahrungen bezüglich der Funktionierung der Gesellschaften derartigen Charakters.

Die Gesetzesverordnung über die Assoziation regelt auch eine mit Namen versehenen Formen der Wirtschaftsgesellschaft. Bei einer *Außenhandelsgesellschaft* vereinbaren sich zur Betreibung von Außenhandelstätigkeit berechtigtes Unternehmen und eine andere Wirtschaftsorganisation (inländisches Produktions-Handelsunternehmen), zwecks Förderung ihrer gemeinsamen wirtschaftlichen Interessen, daß sie einerseits auf dem Gebiet der Außenhandelstätigkeit, andererseits auf dem

Gebiet der damit zusammenhängenden Produktion, eventuell auch des inländischen Umsatzes kooperieren, sich an dem Gewinn gemeinsam beteiligen und auch den Verlust gemeinsam tragen. Diese Konstruktion erübrigt also die Vermögensvereinigung, schafft aber eine Risikogemeinschaft unter den Teilnehmenden, darum kann die Gesellschaft als eine spezielle Form der im Grunde genommen koordinativen Assoziation angesehen werden. Bei einer *Forschungs-Entwicklungsgesellschaft* schließen die Beteiligten einen Vertrag darüber, daß sie im Interesse der Erreichung, Einführung oder Realisierung von bestimmten Ergebnissen der Forschung und Entwicklung zusammenwirken und sich an dem erzielten wirtschaftlichen Ergebnis gemeinsam beteiligen. Auch diese Assoziationsform ist also nicht unbedingt vermögensvereinend, hat aber auch einen Risikogemeinschaftscharakter. (Die Durchführungsverordnung erstreckte den Umfang der Kooperation auch auf die Produktion, und machte es möglich, daß auf diesem Gebiet solche Assoziationen gegründet werden können, die über Rechtspersönlichkeit verfügen und in From von Vereinigungen funktionieren.)

Unter den über Rechtspersönlichkeit verfügenden Assoziationsformen ist die *Vereinigung* eine grundlegend koordinative, zwecks Förderung der Wirtschaftsinteressen der Mitglieder und Abstimmung ihrer darauf abgerichteten Tätigkeit gegründete Organisation. Mit Aushilfscharakter kann sie grundlegend für die daran Beteiligten auch wirtschaftliche und dienstleistende Tätigkeit ausüben und kann auch über ein zu ihrer Tätigkeit notwendigen Vermögen verfügen. Für die Schulden der Vereinigung haften die Beteiligten als Bürgen. An der Leitung der Assoziationen nehmen die Beteiligten im allgemeinen im Verhältnis ihres Vermögensbeitrags teil. Die Vereinigung ist keine gewinnorientierte Form, die Einnahmen oder der Verlust ihrer wirtschaftlichen Tätigkeit verringern oder erhöhen die durch die Beteiligten zu deckenden Erhaltungskosten. (Unabhängig von den typischen Vereinigungen funktionieren in Ungarn, aufgrund spezieller Rechtsnormen, mit experimentellem Charakter, auch sogenannte Agrarindustrievereinigungen.)

Das *gemeinsame Unternehmen* ist ein ausdrücklich zur Ausübung einer Wirtschaftstätigkeit gegründetes sekundäres Unternehmen, dessen Vermögensmittel die gründenden Wirtschaftsorgane sicherstellen. Der Gewinn und der Verlust des Unternehmens teilt sich unter den Gründern im Verhältnis ihres Vermögensbeitrags, für die Schulden sind sie aber als Bürgen haftbar. Das ist jenes Moment, das diese Gesellschaft von der im wesentlichen ebenfalls sekundären *Kommanditgesellschaft* unterscheidet. In diesem Fall sind nämlich die Beteiligten für die Schulden der Assoziation nur bis zur Höhe ihrer Vermögenseinlagen verantwortlich. Aus der Unterschiedlichkeit der Verantwortungskonstruktion unterscheidet sich auch die rechtliche Regelung des Anfangsvermögens der beiden Formen. Während das gemeinsame Unternehmen über ein Anfangsvermögen verfügen muß, das eine ungestörte Funktion für ein Jahr sicherstellt, bestimmen bei der Kommanditgesellschaft die Finanzorgane bei der Gründung den Betrag des Anfangsvermögens individuell.

4. Die Mehrzahl der die Assoziationen betreffenden Verwaltungsvorschriften bezieht sich hauptsächlich auf die Assoziationsformen mit Rechtspersönlichkeit, weil bei den Wirschaftsgesellschaften — aus ihrem grundlegend Vertragscharakter folgend — weder ein spezielles Genehmigungsverfahren, noch, im Laufe ihrer Funktionierung, eine staatliche Aufsicht notwendig ist. (Eine Ausnahme bildet der Kreis der durch die Staatsbürger in Gesellschaftsform gegründeten wirtschaftlichen Arbeitsgemeinschaften.)

Die Staatsverwaltungstätigkeit gegenüber den Assoziationen mit Rechtspersönlichkeit ist im wesentlichen eine spezielle, komplexe, staatliche Gesetzmäßigkeitsaufsicht, die die entsprechend der Tätigkeit der Assoziationen zuständigen Staatsverwaltungsorganen ausüben. Einzelne Elemente dieser Aufsicht — Fachlenkung, finanzielle Kontrolle — weisen bezüglich der Assoziationen keine besonderen speziellen Züge auf. Eine ausdrücklich mit den Assoziationen verbundene Staatsverwaltungstätigkeit ist aber das *Genehmigungsverfahren*. Bezüglich der Genehmigung der Tätigkeit der Assoziationen haben sich zwei Systeme entwickelt: das normative, beziehungsweise das Konzessionssystem. Im ersten Fall wird nur untersucht, ob bei der Gründung einer gegebenen Assoziation die Rechtsvorschriften eingehalten worden sind, oder nicht, während bei dem anderen —

aufgrund individueller Beurteilung — auch die Zweckmäßigkeit der Funktion der Assoziation untersucht wird. Das ungarische Recht hat grundlegend das Konzessionssystem akzeptiert, die Bestätigung der Verträge kann aber nur dann verweigert werden, wenn der Vertrag rechtsnormwidrig ist, oder die Interessen der Volkswirtschaft verletzt werden. Interessenverletzend für die Volkswirtschaft ist der Vertrag dann, wenn die darin vorgesehene Tätigkeit den im Volkswirtschaftsplan bestimmten Zielsetzungen widerspricht, sich auf die Beschränkung des Wirtschaftswettbewerbs richtet und dadurch fremde Interessen gefährdet, oder wenn das Vermögen der Gesellschaft zur Gründung einer bestimmungsmäßigen Funktion nicht hinreichend zu sein scheint.

Betreffend die finanzielle Regelung der Assoziationen kann bloß das gemeinsame Unternehmen in Frage kommen, da sowohl die Wirtschaftsgesellschaft, als auch die Vereinigung durch ihre Wirtschaftstätigkeit die Ergebnisse der Beteiligten beeinflußt, für sie aber die allgemeinen finanziellen Vorschriften gelten. Für die finanziellen Verhältnisse der gemeinsamen Unternehmen sind dieselben Bestimmungen anzuwenden, wie für die eine identische Tätigkeit betreibenden staatlichen Unternehmen.

5. Es kann aufgrund der seit der neuen rechtlichen Regelung der Assoziationen gesammelten Erfahrungen festgestellt werden, daß sich infolge dessen, daß die für die Wirtschaftsorgane zur Verfügung stehenden freien Entwicklungsmittel ziemlich eingeengt sind, sich eher die eine Vermögensvereinigung nicht beanspruchenden koordinativen Assoziationen verbreiteten; zwecks Vermeidung der administrativen Gebundenheiten werden auch bei diesen Assoziationsformen bei der Gründung die Form ohne Rechtspersönlichkeit, also die viel elastischeren Form gewählt. Die Gründung der koordinativen Wirtschaftsgesellschaften ist neuerlich hauptsächlich in der Bauindustrie zu beobachten.

6. Schließlich soll betont werden, daß wenn auch die Assoziationen geeignet sind zahlreiche in der Volkswirtschaft mangelnde Funktionen zu erfüllen, Wundermittel sind sie doch nicht. Sie sind Teile des Institutionssystems der Volkswirtschaft, sie sind Instrumente der Durchführung der Aufgaben der Volkswirtschaft, und können letzten Endes weder besser noch schlechter funktionieren, als die Gesamtheit der Volkswirtschaft. Ebendeshalb aber, weil sie komplexe Rechtsinstitutionen sind und beinahe sämtliche Elemente des Wirtschaftslenkunssystems aufweisen, kann ihre Untersuchung — eventuell ihre vergleichende Untersuchung — zur Weiterentwicklung der Wirtschaftslenkungssysteme anderer sozialistischen Länder mit gewissen Erfahrungen dienen.

Rechtsnormen

Gesetz Nr. IV vom Jahre 1977	Über die Änderung und den einheitlichen Text des Gesetzes Nr. IV vom Jahr 1959 über das Zivilgesetzbuch der Ungarischen Volksrepublik.
GVO Nr. 4 v. J. 1978	Über die wirtschaftlichen Assoziationen.
Ministerratsbeschluß Nr. 9/1978 (1. II.)	Über die Durchführung der Gesetzesverordnung Nr. 4 v. J. 1978 über die wirtschaftlichen Assoziationen.
Vorordnung des Ministers für Finanzen Nr. 22/1978 (19. IX.) PM. sz.	Über die finanziellen Bedingungen der Gründung und Tätigkeit der wirtschaftlichen Assoziationen.
Verord. des Ministers für Arbeitswesen Nr. 12/1978 (5. IX.) MüM sz.	Über die Arbeitsfragen der wirtschaftlichen Assoziationen.

Verord. d. Ministerrates Nr. 30/1979 (27. IX) Mt. sz.	Über die Forschungs-Entwicklungsproduktionsvereinigungen und Forschungs-Entwicklungs-Produktionsgesellschaften.
Regierungsverord. Nr. 32/1967 (23. IX.) Korm. sz	Über die inländischen Verträge der eine Außenhandelstätigkeit betreibenden Unternehmen (modifiziert durch Ministerratverord. Nr. 54/1978 (7. XII.) Mt. sz.)

F. Fábián

Neue Rechtsnormen im Bereich der Erweiterung der Möglichkeiten der Wirtschaftung von Privatpersonen

1. Verordnung des Ministerrates Nr. 25/1981 (5. IX.) über die *Kleingenossenschaften*

Aufgrund der Modifizierung des Gesetzes Nr. III v. J. 1971 über die Genossenschaften wurde der Ministerrat ermächtigt die Kleingenossenschaften und die gewerblichen und dienstleistenden genossenschaftlichen Fachgruppen zu regeln.

Im Rahmen dessen kam bezüglich der Kleingenossenschaften folgende Regelung zustande: Die Gründung und Funktionierung der Kleingenossenschaften — im Rahmen deren höchstens 100 Mitglieder arbeiten dürfen — hat den Zweck, daß die genossenschaftlichen Gemeinschaften der Staatsbürger, im Rahmen der sich der kleineren Mitgliederzahl anpassenden einfacheren Selbstverwaltung und Arbeitsorganisation durch größere Vermögensbeteiligung und persönliche Mitwirkung Produktions-, Dienstleistungs- oder sonstige gesellschaftlich nützliche Tätigkeit entfalten. Im Rahmen von Kleingenossenschaften können sämtliche wirtschaftliche Tätigkeiten getrieben werden, die durch Rechtsnorm nicht einer staatlichen Wirtschaftsorganisation ausschließlich zugewiesen sind. Zur Gründung der Genossenschaft bedarf es eines mindestens so großen Anfangsvermögens, das zum Beginn der im Statut der Genossenschaft bestimmten Tätigkeit und zur laufenden Funktionierung über ein Jahr notwendig ist. In das Statut der Kleingenossenschaften muß alles aufgenommen werden, was das Gesetz über die Genossenschaften, beziehungsweise die Gesetzesverordnung Nr. 32 v. J. 1971 über die Gewerbegenossenschaften deklariert, sowie die Hauptformen der Vermögensbeiträge der Mitglieder und die sich auf diese beziehenden Vereinbarungen der Mitglieder, es muß ferner jene Wertgrenze angegeben werden, über welche hinaus zur Abschließung von Verträgen die vorherige Zustimmung der Generalversammlung notwendig ist. Die Kleingenossenschaften müssen verkürzte Selbstverwaltungsordnungen setzen, in denen die Regel der Funktionierung der Selbstverwaltungsorgane, der Aufbau der Arbeitsorganisation, die Ordnung der inneren Kontrolle, sowie die mit der Verrichtung der Arbeit und der Verteilung des Einkommens zusammenhängenden Regel, die im Statut nicht enthalten sind, niedergelegt werden müssen. Außer den hauptberuflichen Mitgliedern kann ein mit einem anderen Arbeitgeber in Arbeitsverhältnis stehender Arbeitnehmer im Rahmen einer Arbeitsverrichtung außerhalb der Arbeitszeit seiner Hauptbeschäftigung Mitglied der Kleingenossenschaft werden; Mitglieder können sein auch Personen in Ruhestand, sowie Studenten der Hochschulen im Direktstudium mit Zustimmung der Institution. Über die Aufnahme der Mitglieder entscheidet die Leitung; bei der Aufnahme wird eine Mitgliedschaftsvereinbarung geschlossen, deren Hauptpunkte sind: die individuelle Form und das Maß des Vermögensbeitrags des Mitglieds, die Arbeitszeit, sowie die Festlegung der Art der persönlichen Mitwirkung und der persönlichen Grundgehalts, das bei der Verteilung des persönlichen Einkommens maßgebend ist. Die

Vermögensbeiträge der Mitglieder müssen nicht durch Zeichnung von Anteilscheinen erbracht werden, sondern es kann auch z. B. aus Eigentumsübertragung von Produktionsmitteln, Gebäuden, Werkstätten oder Personenkraftwagen bestehen. Das obligatorische Maß der Vermögensbeiträge macht einen Betrag aus, der einem zwei monatigen Grundarbeitsgehalt des Mitglieds entspricht und ist durch Zeichnung eines entsprechenden Anteilscheines zu erstellen. Das Mitglied kann für Entwicklungszwecke, die durch die Generalversammlung bestimmt wurden, freiwillig Zielanteilscheine zeichnen; die Art der Zeichnung wird durch die Generalversammlung bestimmt. Aufgrund der persönlichen Mitwirkung und des Vermögensbeitrags in Form von Anteilscheinen kommt dem Mitglied vom verteilbaren Einkommen der Genossenschaft ein persönliches Einkommen zu. Wenn die Genossenschaft verlustbringend ist fällt den Mitgliedern verringertes Einkommen zu; der entsprechende Teil der bereits behobenen Einkommen muß zurückgezahlt werden. Falls die Genossenschaft ein Mitglied nicht dauernd vereinbarungsgemäß beschäftigen kann, kann die Generalversammlung die Mitgliederschaftsvereinbarung einseitig kündigen. Gleichzeitig ist die Genossenschaft verpflichtet, dem Mitglied seinen Vermögensbeitrag herausgeben. Das die staatliche Gesetzlichkeitsaufsicht ausübende Organ ist nur infolge von Anmeldungen, die auf Verletzung der Rechtsnormen, des Statuts oder der Selbstverwaltungsordnung hinweisen, verpflichtet eine Untersuchung durchzuführen. Die Genossenschaft ist — außer der vorhergehenden Information über den Zeitpunkt der Generalversammlung und deren Tagesordnung — nicht verpflichtet dem die Aufsicht ausübenden staatlichen Organ sonstige schriftliche Informationen zukommen zu lassen. Die verwaltungszweiglich-fachliche Aufsicht der Genossenschaft wird durch das entsprechende Fachverwaltungsorgan des nach dem Sitz der Genossenschaft zuständigen Rates versehen. Die Verordnung ist am 1. Januar 1982 in Kraft getreten.

2. Verordnung des Ministerrats Nr. 26/1981 (5. IX.) MT. sz. über die *gewerblichen und dienstleistenden genossenschaftlichen Fachgruppen*

Die gewerbliche (baugewerbliche) Produktionsbez. Dienstleistungsgenossenschaftsfachgruppe ist eine in genossenschaftlichem Rahmen funktionierende, über bestimmte autonome und wirtschaftliche Selbständigkeit verfügende Organisation der Staatsbürger, mit wirtschaftlicher Rechnungsführung, aber ohne Rechtspersönlichkeit. Ihre Tätigkeit richtet sich in erster Linie auf Dienstleistungen und Warenerzeugung für die Bevölkerung, ferner auf Herstellung von Produkten für eigene Zwecke und für andere Wirtschaftsorgane und auf Dienstleistungen für dieselben. Eine Fachgruppe kann durch mindestens fünf eintrittsfertigen Mitgliedern gegründet werden. Zu ihrer Gründung bedarf es einer Gründungsmitgliederversammlung, ferner der Sicherstellung der zur ungestörten Funktionierung nötigen materiellen Mittel und der Bestätigung der General- oder Delegiertenversammlung der Genossenschaft. Die Genossenschaft und die Fachgruppe regeln ihre Beziehungen — entsprechend den maßgebenden Rechtsnormen — durch Vereinbarung. In der Geschäftsordnung der Fachgruppe muß unter anderen der Name und Sitz der Genossenschaft im Rahmen welcher die Fachgruppe funktioniert, angegeben werden, ferner es sollen bestimmt werden die wesentlicheren Regeln bezüglich der Beziehung der Genossenschaft und der Fachgruppe, die sich auf die Organisation und ihre Tätigkeit beziehenden wesentlicheren Prinzipien, sowie die Prinzipien der Herausformung und Entwicklung ihrer Tätigkeit unter Festlegung jener Wertgrenze, über welche hinaus nur aufgrund einer vorherigen Genehmigung der Genossenschaft im Namen derselben für die Fachgruppe Verpflichtungen übernommen werden können. Es müssen schließlich die Rechte und Pflichten der Mitglieder festgelegt werden. In den Angelegenheiten der Fachgruppe entscheidet die Mitgliederversammlung, ausgenommen jene Fälle, in denen der Entscheidung — im Sinne der Geschäftsordnung — einem Leitungsorgan (Präsident, Verwaltungsausschuß oder sonstiges) zufällt. Die zur wirtschaftlichen Tätigkeit der Fachgruppe nötigen materiellen Mittel werden zum Teil durch den Vermögensbeitrag der Mitglieder, zum Teil durch die seitens der Genossenschaft oder eines anderen Wirtschaftsorgans zur Nutzung überlassenen Mittel sichergestellt. Die Genossenschaft und die Fachgruppe schließen über die Übergabe der Vermögensmittel und über deren Bedingungen eine

Vereinbarung. Das aus dem Vermögensbeitrag der Mitglieder und aus der Wirtschaftung der Fachgruppe stammende Vermögen muß von dem der Fachgruppe überlassenen Vermögensmittel getrennt in Evidenz gehalten werden. Bei der Fachgruppe muß ein für die Evidenz- und Rechnungsführung verantwortlicher Fachmann beschäftigt werden. Die Tätigkeit der Fachgruppe wird von der Leitung der Genossenschaft laufend mit Aufmerksamkeit verfolgt und unterstützt. Die Mitglieder der Fachgruppe haften bloß mit ihren Vermögensbeiträgen für die mit der Tätigkeit der Fachgruppe zusammenhängenden Schulden; die Genossenschaft haftet aber vor allem mit der für die Fachgruppe in Evidenz geführten Vermögen und mit den übergebenen Vermögensmitteln, für die diesen Rahmen übersteigenden Schulden aber mit ihrem vollen Vermögen. Jede das 15. Lebensjahr vollendete Person kann Mitglied der Fachgruppe sein. Jedes beitretende Mitglied ist verpflichtet einen Vermögensbeitrag zu leisten; dessen Maß wird durch die Mitgliederversammlung bestimmt. Falls das Mitgliedschaftsverhältnis aufhört, muß der Beitrag rückerstattet werden. Die Mitglieder beteiligen sich an dem Ergebnis der Wirtschaft der Fachgruppe aufgrund ihrer persönlichen Mitwirkung und ihrer Vermögensbeiträge; das Verhältnis der Beteiligung wird — innerhalb der Rahmen der Rechtsnormen und der Geschäftsordnung — durch die Mitgliederversammlung jährlich bestimmt. Das Mitgliedschaftsverhältnis hört auf, wenn das Mitglied aus der Fachgruppe austritt, wenn die Fachgruppe aufhört zu bestehen, oder wenn die Fachgruppe das Mitgliedschaftsverhältnis aufhebt; das kann dann geschehen, wenn das Mitglied der Fachgruppe absichtlich Schaden verursacht, oder wenn es seinen aus dem Mitgliedschaftsverhältnis stammenden Verpflichtungen aus vorwerfbaren Gründen dauernd nicht genügeleistet.

Ähnlich den obigen Verfügungen wurde auch die Gründung der *landwirtschaftlichen Fachgruppen* innerhalb der Rahmen von sämtlichen zur Landwirtschaft gehörenden Genossenschaften und staatlicher Güter geregelt (Verordnung Nr.) (27/1981 (5. IX.) MT über die landwirtschaftlichen Fachgruppen. Die Verordnungen über die Fachgruppen sind am 1. Januar 1982 in Kraft getreten.

3. GVO Nr. 15 v. J. 1981, sowie RVO. Nr. 28/1981 (9. IX.) MT (Durchführungsverordnung) über die *wirtschaftlichen Arbeitsgemeinschaften.*

Im Zivilgesetzbuch wurden von der für die zivilrechtliche Gesellschaft maßgebende Regelung abweichende Normen zur Regelung der wirtschaftlichen Arbeitsgemeinschaften geschaffen.

Privatpersonen können zur Verrichtung von Konsum- und sonstigen Dienstleistungen, zur kleinbetrieblichen Produktion und zur Leistung von Tätigkeiten, die die Tätigkeit der Wirtschaftsorganisationen ergänzen, sowie zu deren Organisierung und Förderung wirtschaftliche Arbeitsgemeinschaften gründen. Die Gründung geschieht durch Abschließung eines Gesellschaftsvertrags; die Zahl der beteiligten Personen ist mindestens zwei, höchstens dreißig. Die wirtschaftliche Arbeitsgemeinschaft ist keine Rechtsperson. Zur Gültigkeit des Gesellschaftsvertrags bedarf es einer behördlichen Bestätigung. Die Bestätigung des Vertrags kann nur dann abgewiesen werden, wenn der an Vertrag der Rechtsvorschrift zuwiderläuft. Die behördlichen Befugnisse erster Instanz werden von dem entsprechenden Fachverwaltungsorgan des Exekutivkomitees des nach dem Sitz der wirtschaftlichen Arbeitsgemeinschaft zuständigen Rates ausgeübt. Nach der Bestätigung des Gesellschaftsvertrags nimmt das Fachverwaltungsorgan die Arbeitsgemeinschaft in Evidenz; die Arbeitsgemeinschaft muß auch in das Firmenregister eingetragen werden (— bei der Eintragung müssen die für die Kompetenz eines staatlichen Wirtschaftsorgans zugewiesen wurde. An eine Qualifikation gebundene derartige Tätigkeit ausüben, die durch eine geltende Rechtsnorm nicht der ausschließlichen Kompetenz eines staatlichen Wirtschaftsorgans zugewiesen wurde. An eine Qualifikation gebundene Tätigkeit kann die Arbeitsgemeinschaft nur dann ausüben, wenn sich unter den Mitgliedern eine Person befindet, die den in den speziellen Rechtsnormen niedergelegten Qualifikationsbedingungen entspricht. Zur Führung der Geschäfte der Arbeitsgemeinschaft und zu ihrer Vertretung sind eine oder mehrere im Gesellschaftsvertrag bestimmte Personen berechtigt; diese Beauftragung kann durch die Mehrheit der Mitglieder entzogen werden. Die Mitglieder sind verpflichtet an der Tätigkeit der

Arbeitsgemeinschaft persönlich teilzunehmen. Die Arbeitsgemeinschaft kann mithelfende Familienmitglieder, Angestellte, Heimarbeiter und Facharbeiterlehrlinge beschäftigen; Kleingewerbebetreibende können, unter Beibehaltung des Mitgliedschaftsverhältnisses, auch als Handwerker tätig sein. Die Angestellten des Handwerkers zählen in die der Angestellten der Arbeitsgemeinschaft nicht mit hinein, aber der Gesamtstand kann 30 Personen nicht übersteigen. Die Arbeitsgemeinschaft wirtschaftet mit den aufgrund der Zustimmung der Mitglieder in gemeinsamen Eigentum stehenden Mitteln. Zur Verrichtung ihrer Aufgaben kann sie in staatlichem und genossenschaftlichen Eigentum befindliche Mittel mieten, pachten oder benützen darunter auch solche, deren Nutzung laut der Rechtsnormen für Privatpersonen nicht gestattet ist. Über die Tätigkeit der Arbeitsgemeinschaften wird die Kontrolle durch die Fachverwaltungsorgane der Räte geübt. Das Fachverwaltungsorgan kann die Arbeitsgemeinschaft auflösen, wenn diese die Rechtsnormen schwer, oder trotz Warnung, verletzt, oder wenn sie ihre Arbeit unfachmäßig verrichtet und darauf innerhalb eines Jahre wiederholt aufmerksam gemacht wurde.

Die Wirtschaftsorganisationen und die Haushaltsorgane des Staates können die durch ihre Werktätigen und Pensionisten gegründeten Arbeitsgemeinschaften durch Überlassung von Mitteln, Sicherstellung von Räumlichkeiten und auch in anderer Weise unterstützen. Die *wirtschaftliche Arbeitsgemeinschaft des Betriebes* — die ausschließlich aus den Werktätigen und Pensionisten desselben Betriebes besteht — verwendet vor allem die Mittel des Betriebes, und für ihre Tätigkeit haftet der betreffende Betrieb. Für die Arbeitsgemeinschaften dieser Art sind die allgemeinen Normen betreffend die Arbeitsgemeinschaften anzuwenden. In diesem Fall bedarf es der behördlichen Bestätigung des Gesellschaftsvertrags die vorherige Zustimmung des Betriebsleiters; die Zustimmung kann an Bedingungen gebunden werden. Im Falle der Widerrufung der Zustimmung ist die Arbeitsgemeinschaft die durch das Fachverwaltungsorgan aufzulösen. Die wirtschaftliche Arbeitsgemeinschaft des Betriebes kann mithelfende Familienmitglieder, Angestellte, Heimarbeiter und Facharbeiterlehrlinge nicht beschäftigen. Die Mitglieder der wirtschaftlichen Arbeitsgemeinschaft des Betriebes haften für die Verpflichtungen der Arbeitsgemeinschaft bloß mit der ihrerseits erstellten Beitrag und mit ihrem in der Arbeitsgemeinschaft erzielten Einkommen; für die diese Rahmen übersteigenden Verpflichtungen haftet der Betrieb. Die Verordnung ist am 1. Januar 1982 in Kraft getreten.

4. Verordnung des Ministerrates Nr. 29/1981 (14. IX.) über die *Miete einzelner Gewerbe- und Dienstleistungseinheiten.*

Die Wirtschaftsorganisation kann solche kleinbetriebsartigen Gewerbe- oder Leistungseinheiten, die vor allem die Bedürfnisse der Bevölkerung befriedigen, an Privatpersonen vermieten. Mieter können wirtschaftliche Arbeitsgemeinschaften oder Kleingewerbebetreibende sein (beziehungsweise solche Personen, die zwar über keine Gewebeberechtigung verfügen, deren Erteilung jedoch beantragt wurde und die die dazu nötigen Bedingungen erfüllen. Die Miete kann sich neben den Räumlichkeiten und dem Gebiet der Industrie- oder Dienstleitungseinheit auch auf die zur Inbetriebhaltung nötigen Grundmittel erstrecken. Die Wirtschaftsorganisation kann sich mit dem Mieter über die Sicherstellung sonstiger zur Verrichtung der Tätigkeit nötigen Bedingungen (z.B. systematische Materiallieferung, Übergabe von technischen Fachkenntnissen usw.) vereinbaren. Die Vermietung der Einheit geschieht durch öffentliche Ausschreibung, in Gegenwart eines öffentlichen Notars; darüber muß mindestens 30 Tage vorher in den zentralen oder Komitatsmedien eine Publikation veröffentlicht werden. Die Wirtschaftsorganisation schließt den Mietvertrag mit demjenigen ab, der die höchste Mietgebühr anbietet. Im Mietvertrag ist unter anderen die Mietgebühr (die später nicht verringert werden kann), sowie die Zeitspanne der Miete, die höchstens 5 Jahre ausmachen darf, festzulegen. Der Mieter dort die gemietete Einheit oder die Grundmittel nicht in Untermiete oder in Nutzung von dritten Personen geben. Der Mietvertrag kann von beiden Seiten gekündigt werden, wenn die andere Partei die im Vertrag für ihn vorgeschriebenen Verpflichtungen nicht erfüllt. Die Verordnung ist am 1. Januar 1982 in Kraft getreten.

5. Verordnung des Ministerrates Nr. 30/1981 (14. IX.) MT *über die vertragliche Inbetriebhaltung einzelner Betriebsabteilungen* und die gemeinsame Verordnung des Ministers für Finanzen und des Ministers für Arbeitswesen Nr 24/1981 (14. IX.) PM-MüM über deren Durchführung.

Die Betriebe können ihre — Industrieproduktion, Konsum- und sonstige Dienstleistung, Produktionsmittelhandlung, sowie Abfallsammlung betreibenden — Abteilungen mit höchstens 15 Werktätigen auch im Vertragssystem inbetriebhalten. Es können Abteilungen, deren Tätigkeit durch geltende Rechtsnormen ausschließlich staatlichenWirtschaftsorganisationen zugewiesen wurde nicht vertraglich inbetriebgehalten werden. Der Betrieb schließt mit der sich zur vertraglichen Inbetriebhaltung bereit erklärenden Privatperson, entsprechend den Regeln des Zivilrechts, einen Vertrag. Die Zeitspanne des Vertrags kann höchstens 5 Jahre lang dauern. Der Betrieb ist verpflichtet den Vertrag mit derjenigen Person abzuschließen, von der an der vorangehend bekanntgegebenen öffentlichen Ausschreibung das günstige Angebot stammt. Vertrag kann nur mit demjenigen geschlossen werden, der mit dem Betrieb in Arbeitsverhältnis steht, über entsprechende Fachqualifikation verfügt und nicht unter in einer Sondernorm bestimmten Beschäftigungsverbot steht. Der Vertrag kann auch mit 5, miteinander eine zivilrechtliche Gesellschaft gründenden Personen geschlossen werden. Der Leiter kann das Recht der Inbetriebhaltung der Abteilung keiner anderen Person übertragen. Der Leiter organisiert und lenkt im Namen des Betriebes, jedoch auf eigene Verantwortung und eigenes Risiko die Produktion, beziehungsweise die Dienstleistung. Der Betrieb übernimmt vertraglich die Bürgschaft für die durch die Abteilung im Bereich ihrer Tätigkeit verursachten Schäden. Die in der Abteilung beschäftigten Werktätigen stehen mit dem Betrieb in Arbeitsverhältnis; ihre Zahl und ihr Arbeitslohn ist im Vertrag festzulegen. Der Leiter verfügt über das aus der Tätigkeit der Abteilung stammenden Einkommen, nach Erfüllung der in den Rechtsnormen und dem Vertrag bestimmten Verpflichtungen, frei; er kann von dem Einkommen auch über den im Arbeitsvertrag festgesetzten Lohn hinaus den Werktätigen der Abteilung Zuteilungen zukommen lassen. Der Vertrag kann beiderseitig unter den in der Rechtsnorm festgelegten Bedingungen gekündigt werden. Bei der Beendigung des Vertrags sind die Parteien verpflichtet miteinander zu verrechnen. Der Betrieb ist verpflichtet die bestimmungsgemäß nutzbaren, beziehungsweise verwertbaren Vorräte rückzukaufen. Die Verordnung ist am 1. Januar 1982 in Kraft getreten.

Gleichzeitig mit den oben bekanntgemachten Rechtsnormen wurde die Gesetzesverordnung Nr. 14 v. J. 1977 über das Kleingewerbe (GVO Nr 16 v. J. 1981), und genauso auch die Verordnung des Ministerrates Nr. 3/1980 (6. II.) MT über die Benützung von Kraftfahrzeugen durch Privatpersonen sinngemäß modifiziert, beziehungsweise ergänzt. (Verord. d. Ministerrates Nr. 31/1981 (14.IX) MT).

A. Halustyik

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Recensiones

PESCHKA, V.: Die Theorie der Rechtsnormen*

Es ist keine leichte Last die der auch für theoretische Fragen empfindliche Leser auf seine Schulter nimmt, als er, Vilmos Peschka folgend, jenen an gedanklichen Erlebnissen reichen Weg betritt, an dessen Ende er — wenn er sich, mit genügender Ausdauer von den auftauchenden Schwierigkeiten nicht abschrecken ließ —, als Lohn seiner Entschlossenheit, fühlen kann; er ist am Ende einer gar nicht gewöhnlichen Reise angelangt, die ihm zuteil gewordenen Erlebnisse verharren in seiner Erinnerung.

Vom frühesten Anfang der juristischen Studien gab es für den Rechtsstudenten und später für den ausgebildeten Juristen keinen selbstverständlicheren Lehrsatz, als die sich auf die trichotomische Gliederung der Rechtsnorm beziehende These; als unanfechtbare Tatsache verankerten sich im Gedächtnis die für die Hypothese — Disposition — Sanktion geltenden Begriffe und Anschauungen bezüglich der Bedeutung derselben. Anschauungen deshalb, weil eine mit dem Anspruch der Theoriebildung ausgestattete, hinter die Elemente der Rechtsnorm blickende, die Kategorien der Rechtstheorie und Philosophie auf abstraktem Niveau anwendende Monographie in der marxistischen Rechtswissenschaft noch nicht veröffentlicht wurde. Das „abgedroschene", bei der Begründung sämtlicher Rechtszweige behandelte Thema blickt aus einem völlig neuen Aspekt auf den Leser und regt ihn an die Dinge aus einem neuen Gesichtspunkt durchzudenken. Die Schrift setzt eine bestimmte marxistisch-philosophische Grundbildung voraus; diese als Ausgangsbasis verwendeten Begriffe werden nicht erläutert. Um den Gedankengang des Werkes zu verstehen ist die einheitliche Deutung dieser Begriffe notwendig. Auch der Rezensent erachtet nicht als seine Aufgabe, den Inhalt der angewandten Kategorien darzulegen.

Im ersten *Kapitel*, das den Titel *Die Struktur der Rechtsnorm* führt, werden jene Zusammenhänge exponiert, die zwischen dem inneren Aufbau, der teleologisch-normativen Struktur, beziehungsweise den den Gegenstand der rechtlichen Regelung bildenden gesellschaftlichen Verhältnissen bestehen. Das entscheidende Moment des zur Entstehung der Rechtsnorm führenden gesellschaftlichen Vorgangs ist das Lockerwerden des Zusammenhanges zwischen Partikularität und Gattung. In den primitiven Gesellschaften finden wir eine feste Einheit derselben, erst mit der Entwicklung der Arbeitsteilung, mit dem Erscheinen der Interessen des Individuums, der menschlichen Gruppen und später dann der Klassen kommt der Widerspruch zwischen Partikularität und Gattung zum Vorschein. Letztere herrscht nicht mehr bedingungslos über den ersteren, sie unterdrückt nicht mehr die Verwirklichung derselben in unbedingter Form. Die Auflösung dieses Widerspruches wird nunmehr zur Notwendigkeit, es entsteht der Anspruch zur ordnenden Einreihung dieser Widersprüche. Es entstehen gesellschaftliche Objektivationen, deren wichtigste Funktion eben die Bestimmung der Grenzen der Partikularität ist. Die Aussteckung der Grenzen geht aber nicht nach beliebigen Gesichtspunkten vor sich, sondern das Klasseninteresse wird es sein, das den Trend und die Gesichtspunkte der Auflösung der Widersprüche bestimmt. Der Gesetzgeber setzt durch die Rechtsnorm sein eigenes unmittelbares Ziel zum Ziel anderer Subjekte, und zwar jener Subjekte, die fähig sind dieselbe

* Peschka Vilmos: A jogszabályok elmélete. Akadémiai Kiadó, Budapest, 1979. 228 p.

zu verwirklichen. Der Gesetzgeber verwirklicht nur sein unmittelbares Ziel, die Schaffung der Rechtsnorm, die Realisierung derselben muß anderen überlassen werden. Er erfüllt seine Pflicht in der Regelung der gesellschaftlichen Verhältnisse, in deren Formung auf diese Art.

Die sich aus der Untersuchung der teleologischen Zusammenhänge ergebende weitere Feststellung — daß diese ausnahmslos auf der *Kausalität* gründen — weist einerseits auf die Bedeutung der drei Dimensionen der Zeit in Bezug auf die Rechtsnorm hin, andererseits auf die Widerspiegelung des philosophischen Zusammenhanges der Kausalität im Recht.

Dazu, daß die Menschen die kausalen Zusammenhänge erkennen, aufgrund derselben Ziele setzen, und dann zu diesen Zielen, ebenfalls aus den kausalen Zusammenhängen, die entsprechenden Mittel wählen, ferner daß sie Rechtsnormen schaffen, ist es unerläßlich, daß sie über die Gegenwart hinaus in die Zukunft blicken, das aber nur in Kenntnis der Gegenwart und der Vergangenheit möglich ist. Das dritte Moment des finalen Verbindungssystems, die Realisierung des Ziels durch die gewählten Mittel, ist ein Vorgang, die bereits rein kausal ist. Die Rechtsnorm „plant" die kausalen Zusammenhänge, und zwar dadurch, daß sie das Motiv, d. h. das bestimmte, die erwünschten Resultate erwirkende menschliche Verhalten zum Ziel setzt. Die Rechtsnorm kann ihre Funktion, die Regelung der gesellschaftlichen Verhältnisse, nur dann erfüllen, wenn sie den zwischen dem *menschlichen Verhalten* als Ursache und dem herauszuformenden gesellschaftlichen Verhältnis als Wirkung bestehenden Zusammenhang teleologisch derweise formt daß sie das die Gestaltung des gesellschaftlichen Verhältnisses in eine bestimmte Richtung lenkendes menschliches Verhalten für die Subjekte des gegebenen gesellschaftlichen Verhältnisses zum Ziel setzt. Es geht hier eine interressante Metamorphose vor sich: das im kausalen Zusammenhang als Ursache erscheinendes menschliches Verhalten wird zum Ziel, und als dessen Ursache tritt nun die Rechtsnorm auf. Das bringt dann eigenartige kausale Reihen in Bewegung, da das darin bestimmtes menschliches Verhalten und die sich dazu gesellende Rechtsfolge ein eigenartiges normatives Verhältnis darstellt, das gleichfalls über kausale Zusammenhänge in kausale Relationen zerfällt und sich in diesen realisiert.

Es wäre theoretisch äußerst lehrreich und in der Praxis — besonders für die im Zuge der Verwirklichung der Rechtsnorm auftauchenden Erscheinungen — erläuternd die Frage gründlich zu untersuchen, wie sich die in der Philosophie kennengelernten verschiedenen, „Gesichter" der kausalen Zusammenhänge (notwendige und zufällige, kausal gesetzmäßige und statistisch gesetzmäßige Beziehungen) in den Rechtsnormen widerspiegeln, oder welche Abweichungen eventuell wahrzunehmen sind. Ist überhaupt eine weitere, auch auf das Recht übertragbare Erschließung des philosophisch durchaus nicht homogenen Mittels der Kausalität von Bedeutung?

Eines der interessantesten, spannendsten Fragenkomplexe des ersten Kapitels — soviel Subjektivität darf doch einer Rezension vielleicht zugesprochen werden — ist der die meisten Gedanken und Gegengedanken anregende Punkt IV. Die Rechtsnorm ist eine *eigenartige Widerspiegelung* der objektiven Wahrheit, in ihr, in den speziellen Elementen und in der Struktur der Rechtsnorm drücken sich die für ihre gesellschaftliche Funktion, für die Regelung der gesellschaftlichen Verhältnisse wichtigen Momente verdichtet und homogenisiert aus. Die unmittelbar zum Vorschein kommenden Kategorien, strukturellen Elemente der Rechtsnorm verbergen derart ihre echte innere Struktur, das nämlich, was die Rechtsnorm als Widerspiegelungsform von anderen Widerspiegelungsformen unterscheidet. Indem das Werk in den weiteren die unmittelbar zum Vorschein kommenden Begriffe und Elemente der Rechtsnorm untersucht, läßt es — entsprechend der obigen Erkenntnis — die in ihr versteckt anwesenden echten strukturellen Zusammenhänge aufblinken. Bevor der Verfasser daran gehen würde, die mit den Kategorien der Rechtsnormen zusammenhängenden konkreten Forschungsresultate bekanntzugeben, exponiert er eine allgemeine, mit der Rechtsnorm als Widerspiegelung auftauchende Frage: können sich die Kategorien des logisch Wahren und des logisch Falschen auf die Rechtsnorm beziehen? Es ist schon deshalb

wichtig, sich mit dem Wahrheitswert der Norm zu befassen, die Bedeutung dieser Frage zu erkennen, da es rechtstheoretische Konzeptionen gibt, deren Argument-Arsenale geeignet sind mit ihrer Hilfe harte ideologische Kämpfe auszutragen, und die den Standpunkt vertreten, daß wenn die Rechtsnorm keinen *Wahrheitswert* hat, dann kann es auch nicht die Widerspiegelung der objektiven Wahrheit sein. Kelsen, der die Anwendbarkeit der Widerspiegelungstheorie des dialektischen Materialismus auf die Rechtsnorm in Zweifel zieht und so den Widerspiegelungscharakter der Rechtsnormen in Abrede stellt, bringt als Argument vor, daß die Rechtsnorm, da sie keine Aussage kein logisches Urteil über das gegebene Objekt der Erkenntnis ist, weder wahr, noch falsch sein kann. Die Rechtsnorm wird nicht durch ihren Wahrheitswert, sondern durch ihre Geltung charakterisiert. Peschka, die Herausforderung der in Kampfreihe gestellten Argumente akzeptierend, beschreitet systematisch, Punkt für Punkt den logischen Weg Kelsen's und legt den Standpunkt der marxistischen Rechtstheorie äußerst überzeugend dar.

Die erste Frage, ob nämlich die Rechtsnorm als logisches Urteil, als erkenntnistheoretische Kategorie aufgefaßt werden kann, antwortet er mit einem kategorischen Nein, ist doch deren gesellschaftliche Bestimmung durchaus nicht die Erkenntnis der Wahrheit, sondern ganz im Gegenteil, ein Befehl dafür, was sein soll. Daraus folgt, daß es völlig unrichtig ist im Bezug auf die rechtliche Norm die Frage des logisch Wahren und des logisch Falschen aufzuwerfen. Den Standpunkt des Verfassers zusammenfassend: das Recht hat in erkenntnistheoretischem Sinne keinen Wahrheitswert. Gleichzeitig aber muß festgestellt werden, daß das logisch Wahre und das logisch Falsche — in einem anderen Zusammenhang zwar — in Bezug auf die Rechtsnorm eine Rolle spielt. Daß die Rechtsnorm ihre gesellschaftliche Aufgabe erfüllen kann, dazu bedarf es der Kenntnis jener objektiven Gesetzmäßigkeiten, die in den gesellschaftlichen Verhältnissen zur Geltung kommen. Andererseits kommt in der Rechtsnorm der Willen der jeweiligen herrschenden Klasse als Staatswillen zum Ausdruck, dazu ist es aber notwendig, das im Zuge der Erkenntnis klar wird, was der allgemeine Wille der herrschenden Klasse im gegebenen Fall ist. All das weist aber eben darauf hin, daß die menschliche Erkenntnis bei der Entstehung der Rechtsnorm eine wichtige Rolle spielt. Unter Betonung dieses Umstandes warnt der Verfasser vor unrichtigen Folgerungen, die Erkenntnis und Kenntnis der effektiven menschlichen Situationen mit der Rechtsnorm identifizieren. Die Erkenntnis ist ein unentbehrliches Moment des die Rechtsnorm gestaltenden Widerspiegelungsvorgangs, erschöpft aber nicht das Wesen der Rechtsnorm. Aus dieser Argumentation wird es selbstverständlich, daß die Regeln der Logik für die Rechtsnorm nur partiell und beschränkt Geltung haben. Letzten Endes ist also die Anschneidung der Frage des *logisch Wahren und des logisch Falschen* im Zusammenhang mit der Rechtsnorm nur insofern richtig, als sich die Frage auf die in der Rechtsnorm als Moment figurierende Erkenntnis, beziehungsweise auf die in diesen Kreis gehörenden Feststellungen richtet. Die Geltung der Rechtsnorm kann einen Bruch erleiden, wenn sie *mit der objektiven gesellschaftlichen Wahrheit nicht in Einklang steht* und das kann eine Folge dessen sein, daß die Rechtsnorm auf falschen erkenntnistheoretischen Feststellungen gründet, aber umgekehrt, die Auflösung der Harmonie der Rechtsnorm mit der gesellschaftlichen Wahrheit kann nicht auf die im Zuge der Erkenntnis auftauchenden Fehler zurückgeführt werden. Gewisse Theorien ziehen davon unbegründet die Folgerung, daß die Rechtsnorm keine *Widerspiegelung der wirtschaftlich-gesellschaftlichen Verhältnisse* ist. Im theoretischen Hintergrund dieser Anschauungen steckt jene falsche Voraussetzung, die die Widerspiegelungstheorie — unrichtigerweise — auf die Erkenntnistheorie reduziert. Aus den vorgebrachten Einwendungen folgt aber nicht, daß die Rechtsnorm ein mit dem logisch Wahren und dem logisch Falschen paralleles Kriterium, eine parallele Geltung hat. Denn, während die Wahrheit einer logischen Auslage tatsächlich davon abhängt, ob sie der objektiven Wahrheit entspricht, kann daß von der Geltung einer Rechtsnorm nicht ohne jede Bedingung behauptet werden. Eine Rechtsnorm kann lange Zeit hindurch in Geltung sein trotz dessen, daß sie die wirklichen wirtschaftlich-gesellschaftlichen Verhältnisse versteckt ausdrückt. Aber auch für das Gegenteil dessen

gab es schon Beispiele, wo nämlich eine die gesellschaftliche Wahrheit adäquat widerspiegelnde Rechtsnorm nicht gültig gewesen ist.

In letzter Instanz ist die Geltung der Rechtsnormen geschichtlich davon abhängig, ob sie die objektive gesellschaftliche Wahrheit richtig widerspiegelt, aber die Geltung der Rechtsnorm hängt nicht allein von der adäquaten Form der Widerspiegelung ab, es ist nicht das einzige Kriterium.

Jede Rechtsnorm — weil sie die Verbindung der Autorität, des Subjekts und des Objekts ausdrückt —, muß über drei Elemente verfügen: Hypothese, Disposition und Rechtsfolge (Sanktion). Der Verfasser nimmt den Kampf mit denen auf, die in Abrede stellen wollen, daß die *Hypothese* notwendigerweise ein Element der Rechtsnorm ist. Die reale Grundlage dieser Auffassungen besteht darin, daß in zahlreichen Fällen das Element der Hypothese nur schwer oder überhaupt nicht ausfindig gemacht werden kann, wenn konkrete, gültige Rechtsnormen analysiert werden. Das ist aber nur Schein: einerseits kann es sein, daß die Hypothese der Rechtsnorm nicht in der konkreten Rechtsnorm, zusammen mit der Disposition und Sanktion aufscheint, andererseits gibt es zahlreiche Rechtsnormen, die die Hypothese gar nicht ausdrücken.

Mit dem *Dispositionselement* der Rechtsnorm, mit ihrer verbietenden oder gebietenden Gattung ist sie fähig eine identische Rechtsfolge auszulösen. Aus diesem Gesichtspunkt besteht der Unteschied in der Art der Auslösung. Abhängig davon, ob sich die verbietende oder die gebietende Disposition realisiert, wird auch der Charakter der Rechtsfolge unterschiedlich sein. Bei der Verletzung einer verbietenden Disposition ist die Sanktion wegen der Nichtrealisierung des Verbotes, bei der gebietenden Disposition infolge der Nichtrealisierung der Disposition negativ. Die gemeinsame Eigenheit der beiden Typen ist, daß bei beiden die Nichtrealisierung eine Sanktion nach sich zieht. Zahlreiche in verschiedene Rechtszweige gehörende konkrete Rechtsnorm-Beispiele und deren Analysen überzeugten uns davon, daß hier gar nicht der verbietende oder gebietende Charakter der Rechtsnorm das wichtige ist, sondern daß in der Rechtsnorm die Rechtsfolge von der Realisierung oder Nichtrealisierung der Dispositionen abhängig ist.

Im dritten Element der Rechtsnorm, *in der Rechtsfolge* erblickt der Verfasser die Grundlage des „Sollen" Charakters der Rechtsnorm. Ohne die gesellschaftliche Realität der Rechtsfolge drückt das in der Disposition umgeschriebene menschliche Verhalten des Sollen nur sprachlich, nicht aber in seiner gesellschaftlichrechtlichen Realität aus. Gemäß der traditionellen und mehr oder minder allgemeinen Rechtsnormlehre wird die regelnde Rolle der Rechtsnorm dadurch erfüllt, daß die Rechtsnorm an das Verbleiben des in der Disposition vorgeschriebenen Verhaltens, beziehungsweise an das damit in Gegensatz stehende Verhalten eine nachteilige Folge, eine Sanktion knüpft. Die neueren Auffassungen sehen aber klar, daß an die Disposition auch Vorteile in Aussicht stellende Rechtsfolgen geknüpft werden können. Die Nichtanerkennung dieses Umstandes könnte den „Sollen"-Charakter eines großen Teils der Rechtsnormen zweifelhaft machen. Der Verfasser ist auch mit den Rechtsnormlehrekonzeptionen nicht einverstanden, die behaupten, daß es Rechtsnormen gibt, die keine Sanktionen haben, beziehungsweise viele Rechtsnormen werden durch eine andere Rechtsnorm mit Sanktion ausgestattet. Deshalb hält er die über keine Rechtsfolge verfügenden sanktionierten, und die sogenannten sanktionierenden Normen, als unselbständige Rechtsnormen, überhaupt nicht für Rechtsnormen.

Das *zweite Kapitel* des Werkes behandelt die strittigen Fragen und Unklarheiten im Zusammenhang mit dem *Gegenstand und Wertinhalt der Rechtsnorm*. Die verschiedensten *objektiven* Vorgänge des alltäglichen Lebens und der Bewegung der Gesellschaft werden durch die drei Elemente der Rechtsnorm auf verschiedenen Abstraktionsebenen und Kategorien ausgedrückt. Der Verfasser ist als Ergebnis der Synthese von Rechtsnormuntersuchungen der Meinung, daß die Hypothese und die Disposition am häufigsten auf der Ebene des Besonderen erscheint, einmal der Individualität, das andere mal der Allgemeinheit Platz lassend. Es herrschte im Zusammenhang mit der Rechtsfolge Unsicherheit bei der Entscheidung dessen, ob hier überhaupt von der Erfassung der Objektivität

Rede sein kann. Peschka hält es nicht bloß für möglich, sondern auch für reell; der Schlüssel der Lösung ist die Erkenntnis, daß hier die Sanktion von einer speziellen normativen Inversion gebrauch macht: sie dreht einzelne objektiven Momente der Wahrheit quasi ins Negative. Darin drückt sich die Objektivität der Norm meistens in der Sphäre des Allgemeinen und des Besondern aus. Der Gegensatz zwischen dem konkreten auf Lösung harrenden individuellen Rechtsfall und der Rechtsnorm als komplexe Allgemeinheit wird durch die vermittelnde mittlere Sphäre, durch die Eigenart des objektiven Inhalts der Rechtsnorm aufgelöst. Die Eigenart des objektiven Inhalts der Rechtsnorm wird aber auch durch das Typische repräsentiert. Dieses Typische wird durch zwei Eigenheiten vertreten: einerseits durch die begriffliche Definiertheit des objektiven Inhalts der Rechtsnorm, andererseits durch ihre auf diese Weise gewährte vermittelnde Funktion.

Ein anderes, eine geistige Erregung auslösendes Kapitel des Werkes wird durch eine unwiderlegbare Tatsachenfeststellung eingeleitet: alle drei Elemente der Rechtsnorm sind Resultate der Wertung, daher ist der Inhalt der Rechtsnorm Wertinhalt, die Rechtsnorm ist *Wertträger*. Der Umstand aber, daß die Rechtsnorm eine Wertung ausdrückt, bedeutet nicht gleichzeitig, daß ihr Inhalt einen Wert verkörpert. Dieses Scheindilemma behebt aber der Verfasser, als er die ontologische Herkunft des Wertcharakters des Rechtsnormeninhalts erfaßt: das ist die praktische Summierung des gesellschaftlichen Seins, in der der Wert ein wichtiges Moment representiert. Die Entwicklungsrichtung des gesellschaftlichen Seins liegt in der immer vollständigeren Realisierung des menschlich Wesentlichen. Das bildet für den Verfasser die Waage, auf welche die in der unmittelbaren Praxis des gesellschaftlichen Seins erscheinenden individuellen subjektiven Wertpräferenzen gelegt und gewogen werden und wenn sie der Entfaltung des die objektive Entwicklungstendenz der gesellschaftlichen Gesamtbewegung zusammenfassenden menschlich Wesentlichen entgegenwirken, dann sind sie leicht und repräsentieren keinen Wert, im gegengesetzten Fall aber, wenn sie diesen ständig in Bewegung befindlichen Vorgang fördern, dann stellen sie Wert dar. Die Zunge der Waage, der Wertmaßstab ist einerseits die gesellschaftlich-politische Zielsetzung (die gezielte Gestaltung der gesellschaftlichen Verhältnisse), andererseits aber die immanente rechtliche Kohärenz und Konsequenz des Rechtssystems. Der Wertinhalt der Rechtsnorm ist plural und relativ, ihren Wert bestimmen freilich tendenziös die Interessen der herrschenden Klasse. Der echte Wert des Inhalts der Rechtsnorm wird immer durch die Konkretheit, durch ihren in der Totalität der gesellschaftlichen Verhältnisse eingenommenen Platz bestimmt. Wenn also der Inhalt der Rechtsnorm den Interessen der herrschenden Klasse entspricht, sagt das noch gar nichts über den Wert dieses Inhalts. Das Interesse der herrschenden Klasse und die dieses ausdrückende Rechtsnorm kann einen Wert oder eben keinen Wert haben, abhängig davon, ob sie mit der Gattungsentwicklung des Menschen in Einklang steht, oder sich derselben widersetzt. (Peschka ist übrigens der Meinung, daß der Wert oder der Unwert des Inhalts einer Rechtsnorm auch ansonsten bloß nachträglich, post festum festgestellt werden kann.) Die vielfältigen Zusammenhänge des Wertinhalts der Rechtsnorm werden eindeutig klar, wenn wir die *abstrakten und konkreten Rechtsnormen* überblicken. Trotzdem, daß ihre Existenz und ihr Verhältnis unter die Fragen der Ethik gehören, haben sie auch die Rechtstheorie „in Mitleidenschaft gezogen."

Das Hauptproblem bildet jene Feststellung — einstweilen dubiösen Inhalts — daß unter den moralischen Normen und Rechtsnormen solche gibt, die vom Zeitalter unabhängig sind. Diese drücken die „allgemeinen gattungsmäßigen" Anforderungen aus, sie tragen „universale Gattungswerte". Die *erste Frage*, die beantwortet werden muß, ist, ob wir hinsichtlich der Rechtsnormen überhaupt von abstrakten und konkreten Normen sprechen können. Die erste Treppe der richtigen Annäherung ist es einzusehen, daß die Rechtsnormen immer konkret, in einer bestimmten geschichtlichgesellschaftlichen Totalität erscheinen; gleichzeitig kann aber innerhalb einer gegebenen gesellschaftlichen Formation bloß eine Art von (konkret-geschichtlichen) Rechtssystem bestehen. Dadurch wird es klar, daß eine Abstraktion, die von dieser konkreten Geschichtlichkeit und Gesellschaftlichkeit des Inhalts abweicht, die Rechtsnorm

ihres effektiven gesellschaftlichen Sinnes beraubt. Und wenn wir, von der Grundlage ausgegangen, daß abstrakte Normen existieren, die Frage beantworten wollten, welche Objektivationsformen sie haben, d. h. wo sie erscheinen, wird unser Standpunkt noch unhaltbarer. Zusammengefaßt, die Verbindung zwischen den — (angeblichen) — konkreten und abstrakten Normen des Rechts ist ein irreführender Ausdruck des Zusammenhanges der Rechtsnormen und der Rechtsideologie.

Die *zweite* — hier aktuelle — *Frage* ist die Qualifizierung des Wertcharakters der abstrakten Rechtsnormen. Die zu widerlegende These klingt folgendermaßen: als wertvolle Rechtsnormen qualifizieren die abstrakten Rechtsnormen, weil diese in den Trend des gattungsmäßig Wesentlichen fallen. In dem Gedankengang spukt „das Naturrecht mit wechselndem Inhalt", das eine beliebige Rechtsnorm nur dann für wertvoll hält, wenn darin irgend ein Moment der abstrakten Rechtsnormen enthalten ist. Die Antithese — gleichzeitig der problematische Punkt dieser Auffassung — ist, daß zwischen den abstrakten Rechtsnormen und der Gestaltung des gattungsmäßig Wesentlichen keine unmittelbare Verbindung vorausgesetzt werden kann. Die Synthese zeigt genau, daß da die abstrakten Rechtsnormen — auch ihrem Inhalt nach — in den verschiedensten konkreten gesellschaftlich-rechtlichen Inhalten erscheinen können, die abstrakten Momente werden nur durch den konkreten gesellschaftlich-geschichtlichen Inhalt wertvoll, in welchem sie erscheinen.

Kapitel drei tritt *anhand der Geltung der Rechtsnorm* denen entgegen, die die teologisch-normative Struktur, den Inhalt und die Geltung der Rechtsnorm als synonyme Begriffe auffassen. Der objektive Inhalt und der Wertinhalt der Rechtsnorm baut sich eigenartig, in normativ-teleologischer Weise auf, im Grunde auf der Ebene und in der Kategorie des Besonderen. Die teleologisch-normative Struktur der Rechtsnorm bewegt sich in der durch die Allgemeinheit gebotenen Richtung, für die ganze Struktur ist die Allgemeinheit bezeichnend. Jener Widerspruch, zwischen der Besonderheit des Inhalts der Rechtsnorm einerseits, und der Allgemeinheit der Struktur der Rechtsnorm andererseits besteht, wirft auch ein Licht auf die Wichtigkeit der Geltung der Rechtsnorm ein. Licht die entscheidende Kategorie der Rechtsnorm ist die Allgemeinheit, das sie in ihrer Geltung deklariert. Diese Allgemeinheit der Geltung der Rechtsnorm wird durch die Allgemeinheit des staatlichen Zwangs unterstützt; ihre Geltung ist allgemein, weil die Rechtsnorm mit ihren regelnden Verordnungen für die ganze Gesellschaft gilt. Es versteht sich von selbst, daß der Verfasser den rechtlichen Befehl, der durch die Konkretheit, Individualität und Unvermitteltheit charakterisiert ist, nicht als sog. individuelle Rechtsnorm akzeptiert, da, wenn diese in die über Allgemeinheit, Abstraktion, Transmission und Vermitteltheit verfügende Kategorie der Rechtsnorm eingebaut würden, wir wiederholt einer Abstraktion begegnen würden, die unsinnig wäre. Die Geltung der Rechtsnorm ist die eigenartige Seinsart der Rechtsnorm, darf durchaus nicht abstrakt sein, darf keinen abstrakten Inhalt haben.

Das Problem der *Verwirklichung der Rechtsnorm* als Problem der Voraussetzung ihrer Geltung berührt zahlreiche auch in der Praxis bestehenden Situationen. Nach der Ausgangsthese des Verfassers ist die Geltung der Rechtsnorm wirksam und die gültige Rechtsnorm setzt sich durch. Die Geltung und die Wirksamkeit der Rechtsnorm sind also keine synonymen Begriffe, obzwar die Verwirklichung der Rechtsnorm ohne Zweifel auch deren Geltung beeinflußt. Es ist denkbar, daß die Rechtsnorm nicht geltend wird, obwohl ihre Geltung noch nicht aufgehört hat: Grund der Unwirksamkeit mag sein, daß es noch keine Situation gab, die in der Hypothese beschrieben wurde, es ist aber nicht ausgeschlossen, daß eine solche Situation noch entstehen kann. Es ist klar, daß wenn das Rechtssystem in seiner Gesamtheit dauernd nicht zur Geltung kommt, es gleichbedeutend ist mit dem Aufhören der gesellschaftlichen Basis desselben, damit nämlich, daß die herrschende Klasse ihre Macht eingebüßt hatte, ohne dieser ist aber auch die Geltung des Rechtssystems unvorstellbar.

Neben diesem extremen Fall kann es vorkommen, daß die Rechtsnorm in *spezieller Weise nicht wirksam wird;* dann handelt es sich um die gewohnheitsrechtliche Derogation der Rechtsnorm.

Von den im Schlußteil des Werkes berührten Fragen will ich diesmal jene hervorheben, die die ontologische Widersprüchigkeit der *Rechtsnormen mit rückwirkender Kraft* behandelten, vor allem wegen deren ständige Aktualität und schneidenden Schärfe. Das in Rechtsnorm mit rückwirkender Kraft abgefaßte Verhalten konnte für das Rechtssubjekt in der Vergangenheit keine Alternative der rechtmäßigen Handlung bedeuten. In Einklang mit dem ignorantia iuris-Prinzip muß die Möglichkeit des Kennenlernens der Rechtsnorm allgemein gegeben sein, und die juristische Präsumption dieser Möglichkeit kann nicht gestürzt werden (Interessant sind die über die Problematik des Rechtsquellencharakters der sogenannten inneren Weisungen Geschriebenen). Abhängig davon, ob die ignorantia iuris als Fiktion (die Rechtsnorm ist für die Adressierten bekannt), oder als unstürzbare Präsumption (die Rechtsnorm kann durch die Gesellschaft allgemein kennengelernt werden) interprätiert wird, werden sich in der Zulässigkeit der Rückwirkenden Geltung der Rechtsnorm verschiedene Resultate ergeben.

M. Lehoczky

HERCZEGH, G.: Évolution du droit international humanitaire et ses problèmes actuels*

On connaît des conventions depuis assez longtemps pour l'amélioration du sort des militaires blessés dans les armées en campagne — et d'après certaines données entre la fin du XVI[e] siècle et le début du XIX[e] environ 300 conventions de ce caractère furent conclues[1] néanmoins l'assistance à l'ennemi en détresse ne devint un mouvement international qu'à la deuxième moitié du XIX[e] siècle, à la suite de l'intervention d'Henry Dunant. L'action qu'il avait lancée a pris depuis une ampleur notable et pour le milieu de XX[e] siècle s'est créé un domaine spécifique du droit international, appelé droit international humanitaire.

C'est cette matière juridique que Géza Herczegh a choisi comme sujet de son livre et ce qui donne une actualité particulière à l'ouvrage, c'est que tout recemment les règles du droit international humanitaire ont été complété. L'auteur, — excellent connaisseur des problèmes du droit international humanitaire, ayant participé personnellement, en tant que membre de la délégation hongroise, à la conférence diplomatique sur le droit humanitaire de 1974-1977 — est parmi les premiers dans la littérature de droit international socialiste à esquisser une image d'ensemble des questions d'actualité du droit international humanitaire.

Le premier chapitre du livre traite la formation des règles de droit international relatives à la protection des victimes de la guerre. L'ouvrage cite nombreux exemples pris d'époques reculées, lesquels illustrent qu'au cours des siècles passés, parallèlement à la production de nouveaux moyens de destruction, se développaient des normes juridiques qui essayent de limiter l'emploi de ceux-ci.

Le chapitre suivant traite l'histoire du droit international au service de la protection des victimes de la guerre, laquelle — comme il est connu — commence par la conclusion de la première convention de Genève de l'année 1864 pour l'amèlioration du sort des militaires blessès dans les armèes en campagne. A propos de l'apparition du droit international humanitaire, à la deuxième moitié du siècle dernier, la question se pose: d'où vient le contenu des normes impliquées dans les articles de la convention de Genève. En cherchant l'explication l'auteur rejette les diverses réponses empruntées de droit naturel et montre l'importance du processus de

* A humanitárius nemzetközi jog fejlődése és mai problémái. Budapest, 1981. 348 p. (Évolution du droit international humanitaire et ses problèmes actuels. Editions d'Économie Politique et de Droit.)

[1] Cf.: F. de Martens: Traité de Droit International. Paris, 1887. Tome III. pp. 240.

l'évolution sociale qui a élevé la valeur humaine et l'estime de l'homme producteur. Dans le cadre de ce chapitre l'ouvrage énumère les documents les plus importants du droit international humanitaire, notamment la convention de 1864 sur « l'amélioration du sort des militaires blessés des armées en guerre », la convention de Genève de 1906, la convention de Genève de 1929 sur les prisonniers de guerre, ainsi que les quatre conventions de Genève de 1949. L'auteur laisse de côté l'exposé en détail des diverses dispositions des documents dans leur majorité assez volumineux, et s'attache plutôt à dessiner la ligne directrice de la progression de manière qu'à propos des divers traités il faut ressortir séparément les dispositions caractéristiques, lesquelles se réfèrent à l'apparition de change nouvelle institution du droit humanitaire. Il caractérise l'évolution du droit humanitaire en faisant remarquer que « .... la protection concernant au début seulement les soldats blessés et malades des forces armées de terre s'étendait successivement aux blessés, malades et naufragés de la guerre maritime, puis aux prisonniers de guerre, et finalement — même si c'est dans diverses mesures — à la population civile, respectivement aux divers groupes de celle-ci, touchés par les conflits armés. » (p. 77.)

Le chapitre suivant s'occupe de la notion du droit international humanitaire et de la place de celui-ci dans le système du droit international public. A propos du cercle des règles du droit international humanitaire et de sa place occupée dans le système du droit international, la position de la littérature n'est nullement unanime, il y a bien d'opinions selon lesquelles cette matière juridique est à interprêter largement, en y comprenant l'ensemble des règles de droit international qui sont au service du respect et de l'épanouissement de la personnalité humaine. C'est-à — dire, cette matière juridique impliquerait le droit de la belligérance (ius in bello), les droits de l'homme et même selon certains, aussi les règles dites du « ius contra bellum ». Le « ius in bello » — d'après cette conception — se divise en deux parties: l'une est le droit de la guerre proprement dit, le droit de La Haye, lequel fixe les droits et les obligations des parties belligérantes concernant les opérations de guerre; l'autre partie est le droit international humanitaire dans le sens plus strict du mot, c'est le droit de Genève que s'occupe de la protection des militaires devenus blessés et malades et des personnes civiles. Géza Herczegh n'accepte l'appellation de droit international humanitaire que dans le cas des règles du droit dit de Genève, car c'est seulement cet ensemble de règles « .... qui mérite et porte à juste titre en même temps les qualificatifs « humanitaire » et international ». Nous soulignous : il s'agit de *droit international humanitaire*, c'est-a-dire d'*une partie* des *règles de droit* international qui ont des mobiles humanitaires et servent la protection de la personne humaine, et non pas d'un *droit humanitaire international*, ce qui supposerait un *système juridique humanitaire* non précisé, lequel aurait des règles de caractère international, à côté d'autres règles de caractère non international. » (page 81.). L'auteur démontre que malgré leurs mobiles humanitaires, les droits de l'homme dans leur ensemble ne peuvent pas être classés sous la notion du droit international humanitaire. C'est que la mise en œuvre de la protection internationale des droits de l'homme ne se fait pas « à l'échelle internationale », étant donné que la garantie de ces droits se fait finalement par la voie du droit intérieur des Etats ; par contre dans le cas du droit de Genève, il s'agit de *la protection internationale directe* des personnes appartenant à l'orbite de ce droit.

En analysant le rapport entre les droits dits de La Haye et de Genève l'ouvrage insiste sur un autre problème théorique particulièrement intéressant. Comme il est connu, le droit de La Haye dans son essence signifie celui de la belligérance, il contient les règles juridiques à appliquer en cas de guerre et tout le matériel juridique est caractérisé par la conception selon laquelle la guerre est le moyen reconnu de trancher les litiges internationaux. Par contre, le droit de Genève ne réglemente pas la guerre, mais se charge de la protection des personnes en danger et pour cette raison le droit de Genève est entièrement en accord avec le nouveau droit international qui interdit le recours à la guerre et à la violençe. A propos du rapport des deux matières de droit — en l'espèce de celui des droits de La Haye et de Genève — l'auteur prend la position que dans les circonstantes actuelles leur distinction traditionnelle perdait sa signification,

puisque le droit de La Haye — comme c'est montré par l'évolution qui se profile depuis 1907 — cède progressivement sa place au droit de Genève.

Quant au caractère du droit international humanitaire, Géza Herczegh déduit sa position y relative en partant de la notion des normes de droit international coercitives. Il expose que la Charte de l'ONU, certaines decisions de la Cour Internationale de Justice et le projet de la Commission de Droit International sur la responsabilité de droit international des Etats, présentent les droits fondamentaux de la personnalité humaine comme ceux dont le respect est un objectif commun des Etats formant la communauté internationale. En revanche, le droit international humanitaire défend les droits fondamentaux de la personne humaine, en temps de conflits armés. D'après le livre c'est de là que découle la tendance à octroyer à ces normes un caractère impératif, et *les principes fondamentaux du droit international humanitaire sont des règles de droit international de caractère coercitif.* « Même si l'on ne peut pas affirmer sans réserve et sans explication complémentaire que le droit international humanitaire, dans son ensemble, ait un caractère contraignant, ses principes de base l'ont certainement dès aujourd'hui, et les dispositions stipulant les droits des personnes protégées — les minima de ceux-ci — ne sont en aucun cas dispositives, mais ce sont des règles limitant la liberté des Etats de conclure des traités et dans ce sens doivent donc être considérées comme coercitives. Quant aux tendances d'évolution futures, elles feraient probablement partie du cercle des règles impératives du droit international qui demandent à être appliquées inconditionnellement. » (p. 112.)

Le troisième chapitre de la monographie s'occupe de la nécessité de compléter les conventions de Genève et des efforts qui y tendent.

L'auteur ramène les causes qui rendent nécessaire le complètement des conventions de Genève à trois facteurs principaux qui sont les suivants :

a) Le caractère spécifique des conflits armés d'après 1949, notamment le fait que dans leur majorité ces conflits firent partie du processus de désintégration du système colonial.

b) Les opérations de guerrilla étaient fréquentes au cours des conflits armés, or le droit international ne contient pas de règles qui assureraient la protection les personnes qui y participent.

c) « L'érosion » des règles relatives aux conflits armés. Le droit de La Haye contenant les règles de la belligérance n'a pas progressé pour l'essentiel depuis le tournant du siècle, et ainsi, à la suite du développement de la technique de guerre, il y a des lacunes dans la réglementation de droit international.

Après avoir fait connaître les initiatives tendant à confirmer et à développer le droit international humanitaire et les travaux préparatoires des deux Protocoles de 1977, l'ouvrage passe à la conférence diplomatique de Genève de 1974—1977 et aux principaux résultats de celle-ci. Pour les nouveaux Etats, au fond cette conférence « était une grande école pour connaître le droit de Genève et pour ce dernier, une nouvelle étape de son évolution, où il devint, avec le concours des Etats d'Afrique et d'Asie, cette fois-ci effectivement l'expression de l'idée humanitaire du monde entier. » (pp. 171—172).

L'auteur fait connaître brièvement le contenu des deux Protocoles rédigés à la conférence diplomatique et qualifie de particulièrement important le passage du Protocole I. de 1977 qui étend l'effet des dispositions de l'acte, aux conflits armés dirigés contre l'oppression coloniale, l'occupation étrangère et les régimes racistes.

Le cinquième chapitre de l'ouvrage analyse un des problèmes le plus actuel et le plus important du droit humanitaire, à savoir la protection de la population civile face aux dangers provenant des hostilités. Cette protection peut être obtenue, avant tout, par la voie de la confirmation du principe de la distinction entre biens civils et objectifs militaires, de la population civile des combattants, étant donné que « l'érosion » des règles de la belligérance met en péril précisément ce principe. Cependant la question se pose si avec la guerre et la technique militaire actuelles au fond, peut-on maintenir les distinctions mentionnées. Selon le point de vue majoritaire — et c'est ce que reflète le Protocole I. — il est toujours nécessaire de faire cette

distinction, laquelle se heurte néanmoins à des grandes difficultés pratiques. Le Protocole I. de 1977. réaffirme sans doute le principe de la distinction, mais les définitions y attachées sont loin d'être irréprochables et l'auteur, de sa part, considère comme problématique la définition des objectifs militaires, en utilisant la notion des dits avantages militaires.

La question du principe de la dite « proportionnalité » se lie étroitement à la règle de la distinction. Pour l'essentiel le principe de la proportionnalité se réfère à ce qu'il faut mettre toujours en rapport les pertes et dommages causés éventuellement dans la population civile et les biens de caractère civil, avec les avantages militaires directs et essentiels attendus et qu'il est interdit de causer de trop grands pertes et dommages disproportionnés. Géza Herczegh analyse en détail le problème de la proportionnalité et selon lui ce principe, — lequel ne s'était pas avéré un moyen adéquat ni au sujet de la légitimité du déclenchement d'une guerre, ni lors de l'application des représailles, — selon toute probabilité ne répondrait pas à l'attente non plus au cours de la mise en pratique des dispositions visant à la protection de la population civile. En reconnaissant que de toute évidence on ne pourra jamais éliminer entièrement les pertes civiles et les dommages causés dans les biens civils, des conflits armés, il désapprouve que leur mesure admissible dépende de la grandeur de l'avantage militaire attendu. D'après lui ce sont les dispositions dites de précaution qui auraient été les plus propres à limiter les pertes et dommages civils éventuellement causés «.... lesquelles — comme toutes les dispositions des Protocoles doivent être appliquées avec bonne foi par les parties opposées et dans leur ensemble représentent des garanties qui paraissent sensiblement plus rassurantes que la formulation citée et plusieurs fois contestée de la règle de la proportionnalité. » (p. 222) L'insertion du principe de la proportionnalité dans le Protocole est comparée par l'ouvrage à une porte qui peut s'ouvrir très large en cas de conflits armés, pouvant justifier par la grandeur de l'avantage militaire direct et concret attendu les pertes et dommages intervenus au milieu de la population civile et de ses biens.

L'auteur voit la plus grande nouveauté du Protocole I. de 1977. en ce que celui-ci a considérablement élargi le cercle des biens protégés, surtout quant aux conditions matérielles de la vie digne à l'homme.

Le chapitre suivant examine le protection de droit international des guerrillas ou partisans qui a été une des parties les plus problématiques au cours de l'élaboration du Protocole I.

L'ouvrage fait d'abord connaître les propositions soumises à la conférence diplomatique de Genève relatives à la protection des partisans. L'auteur démontre qu'au fond une des questions centrales de toute la problématique est la reconnaissance du statut de *combattant* des partisans. C'est-à-dire que ces derniers aient également le statut de pouvoir commettre des actes de guerre sans qu'ils soient mis en cause ou punis, seulement dans le cas où ils enfreignent au cours des actes de guerre les règles du droit de la belligérance.

La conférence diplomatique de Genève a admis une large définition de la notion de combattant, selon laquelle les partisans, les guerrilleros, respectivement les résistants armés y sont inclus. Géza Herczegh souligne que cette définition a changé aussi le problème juridique effectif: c'est qu'alors ce n'est pas l'*obtention du statut de combattant* qu'il fallait régler, mais la question: *quand se produit la perte de statut de combattant*. Le livre parle en détail de l'établissement de la solution de compromis relative à l'article sur les partisans, ainsi que de l'approbation et de l'interprêtation de l'article. L'auteur estime que les dispositions concernant les partisans ne sont pas impeccables de point de vue juridique, mais il reconnaît en même temps l'importance de ce que l'article 43 supprime dans le fond toute distinction entre forces régulières et irrégulières et de ce fait les guerrillas bénéficient de la même protection que les membres des forces armées traditionnelles. Les dispositions relatives aux guerrillas représentent un développement progressif du droit international humanitaire et servent les intérêts des peuples combattant pour leur droit de disposer d'eux-mêmes, contre l'oppression étrangère et les régimes racistes.

Le septième chapitre de la monographie traite le Protocole II. qui s'occupe de la protec-

tion des victimes des conflits armés de caractère non-international. C'est l'article 3.commun des conventions de Genève de 1949 qui avait disposé au sujet de cette question, cependant le Protocole II. a élargi le contenu de l'article dans une mesure notable. L'auteur attire l'attention sur le fait qu'en jugeant le Protocole II., il importe à quoi nous comparons ce document: aux dispositions du Protocole I. ou bien à l'article 3 commun des conventions de Genève. C'est que si nous comparons le Protocole II. aux passages mentionnés en premier, il s'avère que le progrès est notable aussi dans ce domaine.

Le dernier chapitre de l'ouvrage analyse les rapports entre les représailles, c'est-à-dire les mesures de répression et le droit international humanitaire. Le livre pose la question si dans la phase actuelle de l'évolution du droit international humanitaire les représailles militaires ont-elles encore leur place. La réponse de Géza Herczegh à la question se repose sur les réalités de la vie internationale, lorsqu'il écrit qu'à l'heure actuelle il serait encore difficile d'éliminer les représailles du droit des conflits armés et d'interdire absolument leur application. Pour l'essentiel c'est le même rapprochement qui est reflété par la solution qui ne contient pas de règle générale relative à l'interdiction des représailles, mais dispose en même temps, à part, de l'interdiction d'emploi de mesures répressives contre les personnes et les biens protégés.

Le livre présentant l'évolution du droit international humanitaire et les problèmes actuels de celui-ci est une œuvre de grande valeur de la littérature hongroise de droit international qui porte non seulement la marque de la connaissance supérieure de l'éminent spécialiste, mais aussi celle de l'intention sincère du savant et sa conviction profondément humaniste, de promouvoir par cet ouvrage les buts pour lesquels Henry Dunant et ses compagnons s'étaient entrés en lice au siècle dernier.

V. Lamm

PRUGBERGER, T.: Mitgliedschaftsvereinbarungen in den Genossenschaften*

Der Verfasser hat den Zweck seines Werkes in den letzten Sätzen des Buches in solcher Weise zusammengefaßt, daß er die genossenschaftlichen Mitgliedschaftsvereinbarungen aus der Peripherie des Rechtslebens herausnehmen und in zentralere Gebiete der Aufmerksamkeit stellen wollte. Wir sind der Meinung, daß er diesen Zweck in vollem Maße erreicht und keine überflüssige Arbeit geleistet hat. Sein Werk ist vom Standpunkt des Rechts der landwirstchaftlichen Produktionsgenossenschaften, des Zivilrechts und des Arbeitsrechts beachtenswert. Nachstehend möchten wir zunächst einige arbeitsrechtlichen Aspekte des Werkes hervorheben, darüber hinaus werden wir aber eine kurze Übersicht des ganzen.Buches geben.

Das Buch besteht aus vier Teilen. *Der erste Teil* beschäftigt sich mit den allgemeinen Fragen der Mitgliedschaftsvereinbarungen, undzwar in zwei Kapiteln. Das erste Kapitel berichtet über die Entfaltung, den Begriff und der Systembezogenheit der genossenschaftlichen Mitgliedschaftsvereinbarung, während das zweite Kapitel die Lage der Mitgliedschaftsvereinbarung im System des Genossenschaftsrecht erhebt. Der Verfasser berührt hier schon zahlreiche, vom Standpunkt des Arbeitsrechts aus Interesse beanspruchende Fragen. Er geht davon aus, daß die persönliche Mitwirkung der Mitglieder in Erreichung der wirtschaftlichen und gesellschaftlichen Ziele der Genossenschaft bei den Produktionsgenossenschaften sich in erster Reihe in der Arbeit der Mitglieder offenbart (p. 65). Das Mittel der Konkretisierung der Arbeit der Mitglieder ist die Arbeitsvereinbarung, in welcher innerhalb durch die Genossenschaftsrechtsnormen und innere Vorschrifte bestimmten Rahmen

* Tagsági megállapodások a szövetkezetekben. Közgazdasági és Jogi Könyvkiadó, Budapest, 1979. 438 p.

das Verhältnis der Genossenschaft und des Mitglieds, die Arbeitsverrichtungsbeziehungen im gegenseitigen Einverständnis geregelt werden. Darin verpflichtet sich das Mitglied, für die Genossenschaft oder im Interesse der Genossenschaft gegen Arbeitsentgeld gewisse Arbeit zu verrichten, gewisse, durch Arbeit erreichbare Ergebnisse zu verwirklichen oder gewissen Arbeitsbereich zu bekleiden (p. 71). Die Lösungen ergebnispflichtigen Charakters, die sich von der, im Arbeitsverhältnis verrichteten Arbeit am meisten unterscheiden, sind bei ungebundener Arbeitsorganisation vorkommenden Arbeitsverrichtung zu finden, mit welcher sich der Verfasser im weiteren besonders beschäftigt (p. 211 et seq.).

Bei den aus dem Vertragscharakter der Mitgliedschaftsvereinbarung herrührenden Eigentümlichkeiten regt der Verfasser die Frage des relativ zwingenden Charakters an. Seine Ausführungen beziehen sich offensichtlich auch auf die Arbeitsvereinbarungen. Der relativ zwingende Charakter bedeutet, seiner Meinung nach, daß die Vertragsabschlußfreiheit der Parteien gebunden ist und sich nur auf den, durch die Rechtsregel zugelassenen Gebiet oder auf solche Fragen erstreckt, welche nicht durch Rechtsnormen verbindlich geregelt sind (p. 96). Aus dem Text der Rechtsregel geht aber nicht immer eindeutig hervor, welche Regelungen verbindlichen (zwingenden) und welche nachgiebigen (dispositiven) Charakter haben. Das ist manchmal das Ergebnis der Formulierungsunzulänglichkeiten. Deshalb herrscht auch solche Auffassung, daß wo die Rechtsregel die Verfügungsfreiheit der Parteien ausdrücklich nicht ausschließt, oder umgekehrt, diese ausdrücklich nicht zuläßt, die Abweichung von der Rechtsregel auch in diesem Falle möglich ist, dies aber einen Nachteil für Arbeitnehmer nicht mit sich bringen darf, wenigstens nicht im Arbeitsrecht. Wir halten es dafür, daß auch bei den Mitgliedschaftlichen Arbeitsvereinbarungen keine andere Tendenz zur Geltung kommen kann. Dazu soll noch hinzugefügt werden, daß sich all dies nur auf die *praeter legem* Vereinbarungen bezieht, die *contra legem* Vereinbarungen auch in solchem Falle unzulässig sind. Übrigens zieht der Verfasser hinsichtlich des Verhältnisses des zwingenden Charakters und der Dispositivität, bezüglich der Genossenschaften, die allgemeine Schlußfolgerung, daß das positive Recht, ähnlich wie bei den, im Arbeitsverhältnis stehenden Arbeitnehmern, die berechtigten Interessen der Mitglieder gegen die, eine größere Wirtschaftsstärke vertretende Genossenschaft zu schützen beabsichtigt (p. 116).

Die mitgliedschaftliche Arbeitsvereinbarung ist eingehend *im zweiten Teil* des Buches dargelegt. Separate Kapitel erörtern die allgemeinen Fragen der Arbeitsvereinbarungen, die in großbetrieblichen Organisationsrahmen für kollektive Arbeit abgeschlossenen Mitgliedschaftsvereinbarungen, die die außerhalb der großbetrieblichen Arbeitsorganisation verrichtbare Arbeit regelnden Vereinbarungen, die Mehrzwecksvereinbarungen gemischten Typs und die Sanktionssysteme der Mitgliedschaftsvereinbarungen.

In diesem Teil legt der Verfasser im Laufe der Erörterung der allgemeinen Fragen, den ursprünglichen Zweck des Abschlusses der Arbeitsvereinbarungen in den Genossenschaften plastisch dar (p. 120 et seq.). Er geht davon aus, daß früher der Vorstand der Genossenschaft einen bedeutenden Teil der Mitglieder den konkreten Ansprüchen entsprechend immer einem anderen Arbeitsbereich einteilen konnte. Die ständige Veränderung des Arbeitsbereiches durch diesen einseitigen Akt des Vorstandes war für die Mitglieder gemeinhin beschwerlich. Deshalb wurde die Fixierung des stabilen Arbeitsbereichs der Mitglieder erforderlich, die durch den Abschluß der Arbeitsvereinbarung möglich ist. Im Falle des Abschlusses einer Arbeitsvereinbarung hat nämlich die Genossenschaft kein Recht, den Mitglied, ohne seine Zustimmung, einseitig in eine andere Arbeit als in der Arbeitsvereinbarung enthalten ist, einzustellen. Diese Konstruktion nähert sich übrigens stark der im Arbeitsrecht zur Geltung kommende Vertragskonzeption an, obwohl sie nicht als damit identisch betrachtet werden kann, wie der Verfasser es nachstehend beweist. Die Arbeitsvereinbarung berührt keineswegs dasjenige Recht des Vorstandes der Genossenschaft, daß er die Mitglieder vorübergehend zur Verrichtung anderer Arbeit verpflichten kann, wenn deren Notwendigkeit, besonders bei Spitzenbeanspruchung oder bei erhöhten Arbeitsanfall, vorkommt. In seinen Ausführungen nimmt der

Verfasser den Standpunkt ein, daß in der Vereinbarung auch die vorübergehend verrichtbaren Arbeite festgelegt werden sollten (p. 132). Wir sind der Meinung, daß mit Rücksicht auf die Vielfältigkeit der vorübergehend vorkommenden Arbeiten, diese Festlegung kaum möglich wäre und auch die arbeitsrechtliche Regelung nicht an solche Gebundenheiten denkt. Selbst die Kodifizierung vom Jahre 1979 des Arbeitsgesetzbuches hat nur die zeitlichen Grenzen der vorübergehende Einstellung in eine andere Arbeit festgelegt, wenn sie aussagt, daß die zum Arbeitsbereich nicht gehörige oder außerhalb dem ständigen Arbeitsort zu verrichtende Arbeit in einem Kalenderjahr nicht mehr als drei Monate ausmachen kann, mit der Ausnahme, wenn außerordentliche Umstände eine längere Zeit rechtfertigen oder solche im Kollektivvertrag bzw. in der Arbeitsordnung vorgeschrieben ist.

Nachstehend untersucht der Verfasser die subjektive Seite der Arbeitsvereinbarungen vom Standpunkt der Mitglieder und von dem der Genossenschaft. Er weist darauf hin, daß die Mitgliedsvereinbarungen sowohl individuell als auch in Gruppenform abgeschlossen werden können. Diese Möglichkeit besteht auch bei den mitgliedschaftlichen Arbeitsvereinbarungen. Diesbezüglich ist übrigens der Verfasser der Meinung, daß infolge der Modifizierung der Rechtsnormen über die Genossenschaften im Jahre 1977 die Gruppenarbeitsvereinbarung zur Kategorie der Vergangenheit wird, da ihre Rolle stufenweise von den, durch die Kollektive der Arbeitstätten gesetzten inneren Regelungen übernommen wird (p. 140).

Im Kapitel über die zur Kollektivarbeit in großbetrieblichen Organisationsrahmen abzuschließenden Mitgliedschaftsvereinbarungen kann hinsichtlich der Arbeitsvereinbarungen und der Arbeitsverträge, die Forschung ihrer gemeinsamen bzw. abweichenden Merkmale Interesse erwecken. Wir sind der Meinung, daß der Verfasser hier auf das Wesen der Dinge hinweist, wenn er betont, daß während der Arbeitsvertrag hinsichtlich des existentiellen Fortkommens ein grundsätzlich bedeutendes Rechtsverhältnis begründet, die Arbeitsvereinbarung ein schon begründetes Rechtsverhältnis solchen Charakters nur konkretisiert. Was nun die Gegeneinanderstellung der mitgliedschaftlichen Arbeitsvereinbarungen und den Arbeitsverträgen der bei den Genossenschaften angestellten Arbeitsnehmer betrifft, weist der Verfasser darauf hin, daß die Bestimmung der Arbeitsaufgaben bei beiden verträglichen Rechtsinstitutionen, sich aus der Gleichartigkeit der Arbeitsbereiche ergebend, beinahe gleich ist. Unterschiede zeigen sich im allgemeinen nur bei der Feststellung des Arbeitsentgeldes, infolge der Eigentümerstellung und folgenderweise der größeren Risikoübernahme des Mitglieds. Trotzdem sind auch bei der Feststellung des Arbeitsentgeldes Annäherungsbestrebungen von der Seite sowohl der Mitglieder als auch der Angestellten zu beobachten, demgemäß, wo die Bedingungen günstiger sind. Die Gründe diese Annäherungstendenz sind in manchen Beziehungen eben auf die Bestimmungen der Rechtsnormen zurückzuführen. Das ist bei den Gewerbegenossenschaften beinahe vollkommen, bei den landwirtschaftlichen Genossenschaften ist es auch fortgeschritten. Dessenungeachtet stehen die Dinge so, daß während die mit den Angestellten der Produktionsgenossenschaften abgeschlossenen Arbeitsverträge inhaltlich alle wesentliche Bedingungen enthalten, die mit den Mitgliedern abgeschlossenen Arbeitsvereinbarungen meistens nur die mit der Arbeit enger verbundene Verhältnisse umfassen (p. 169).

Vorangehend wurde es schon darauf hingewiesen, daß die die Arbeitsverrichtung außerhalb der großbetrieblichen Arbeitsorganisation regelnden Vereinbarungen auch Lösungen ergebnispflichtigen Charakters enthalten. Damit beschäftigt sich der Verfasser eingehender in einem separaten Kapitel. Hier — wie er schreibt — dringen die „zivilrechtlichen" Lösungen infolge der Einschaltung des unternehmerischen Elementes bis zu einem gewissen Grad ein. Seiner Meinung nach ergeben sich diese Unterschiede gegenüber dem „Arbeitsgesetzbuchmodell" aus dem genossenschaftlichen Charakter, aus der viel mehr elastischen Annäherung zum Bevölkerungsbedarf, in Vergleich, mit den staatlichen Unternehmen (pp. 211, 235). Beispiele können auch dazu gefunden werden, daß keine gesonderte Vereinbarungen bezüglich der innerhalb und der außerhalb der großbetrieblichen Arbeitsor-

ganisationsrahmen verrichteten Arbeit abgeschlossen werden, sondern die beiden in eine Arbeitsvereinbarung gefaßt sind (p. 236).

In dem Kapitel über das Sanktionssystem der Mitgliedschaftlichen Arbeitsvereinbarungen beschäftigt sich der Verfasser gesondert mit den materiellen Sanktionen der Vereinbarungen bezüglich der, in großbetrieblichen Organisationsrahmen verrichteten Arbeit und der bezüglich der außerhalb des Organisationsverbandes des Großbetriebs verrichteten Arbeit abgeschlossenen Vereinbarungen, danach erörtert er die Frage der Disziplinarverantwortung im Zusammenhang mit der Vereinbarungsverletzung. Die absichtliche oder grob fahrlässige Verletzung der Verpflichtungen durch den Mitglied erschöpft nämlich den Tatbestand des im Genossenschaftskodex und in Zweigverordnungen bestimmten genossenschaftlichen Disziplinarvergehens (p. 259). In diesem Abschnitt hat der Verfasser zum Schluß seine Aufmerksamkeit der Nichtigkeit der Arbeitsvereinbarungen gewidmet (p. 259).

Im dritten Teil des Buches beschäftigt sich der Verfasser mit den von landwirtschaftlichen Produktionsgesellschaften individuellen Hauswirtschaftlichen Vereinbarungen und mit sonstigen mitgliedschaftlichen Vereinbarungen der Genossenschaften. Nach der Feststellung des Verfassers wickelt sich die individuelle Hauswirtschaftliche Vereinbarung als eine Tätigkeit vom *dare* und *facere* Charakter ab. Die Grundform der persönlichen Mitwirkung ist zwar auch hier die Arbeitsverrichtung, welche aber nicht im Rahmen der großbetrieblichen Arbeitsorganisation der Genossenschaft geschieht. Die Gefahr der Tätigkeit ist aber hier größtenteils von dem, die Arbeit verrichtenden Mitglied selbst, aufgrund des Prinzips „casus nocet domino", getragen, da die Tätigkeit bis zum Eintritt des Produkt- und Geldaustausch auf Grund des Eigentums, im Interessenkreis des Landwirts der individuellen Hauswirtschaft geschieht. Das zwischen dem Mitglied und der Genossenschaft auf diesem Gebiet entstehendes Rechtsverhältnis ist also nicht nur durch die Arbeitsbeziehung, sondern auch durch die Vermögensbeziehung gekennzeichnet. Diese Beziehung hat also in doppelter Richtung gemischten Charakters. Darin offenbart sich aber der Vermögensinhalt in größerem Maße, als in jedem anderen Falle der Arbeitsvereinbarungen (p. 298).

Anschließend an die mit den Arbeits- und Organisationsverhältnissen im Zusammenhang stehenden Vereinbarungen sind auch interessant diejenigen Erörterungen des Verfassers, in welchen er darauf hinweist, daß die, die Hauptkennzeichen von kollektiver Struktur enthaltenen arbeitsrechtsähnlichen Arbeitsvereinbarungen durch die, die Hauptkennzeichen von autonomer Struktur enthaltenen vermögensrechtlichen Elemente beeinflußt sind, während die ursprüngliche autonome Struktur der individuellen Hauswirtschaftlichen materiellen Vereinbarungen durch Institutionen von kollektiver Struktur zu eine solche Synthese geformt werden, deren Wesen bei dem Mitgliedschaftsverhältnis und bei den Mitgliedschaftsvereinbarungen weder arbeitsrechtlichen, noch zivilrechtlichen, sondern einen selbständigen genossenschaftsrechtlichen Charakter hat (pp. 379—380).

Eine der wichtigsten Feststellungen seiner zusammenfassenden Feststellungen ist auch die oben erwähnte. Der Verfasser lenkt die Aufmerksamkeit darauf, daß da die durch die Vereinbarungen konkretisierten Arbeits- und Vermögensverhältnisse der Mitgliedschaftsbeziehung miteinander in Wechselwirkung stehen, keine scharfe Grenze zwischen den einzelnen Vereinbarungstypen gezogen werden kann. Diese Grenzen können sich sogar verschmelzen. Überdies tragen aber die Arbeitsvereinbarungen bezüglich der Arbeitsverrichtung inhaltlich diejenigen meist charakteristischen Züge der rechtlichen Regelung welche durch das Arbeitsrecht, im Falle der Mitgliedsvermögensvereinbarungen aber entsprechend der Regelung der Vermögensverhältnisse durch das Zivilrecht ausgestaltet sind. Die zwischen einiger Teilbefugnissen des Mitgliedsverhältnisses und in dieser Weise zwischen einigen Vereinbarungstypen bestehenden nicht scharfen Grenzen oder sogar Überdeckungen ermöglichen die Erscheinung solcher Kombinationen, in welchen die Vermischung dieser „arbeitsrechts-" sowie „zivilrechtsähnlicher". Elemente solches Neue schaffen, welches eine, schon vollkommen neuartige, genossenschaftliche Form annehmend, erscheint (p. 403).

Schon die obige kurze Übersicht des Werkes beweist, daß der Verfasser bei der Bearbeitung eines verhältnismäßig engen und vernachlässigten Gebiet des Rechts zu nützlichen und vorwärtsweisenden Feststellungen gelangen ist, undzwar in solcher Weise, daß er die induktive Methode gewählt hat, d. h. aus der Praxis ausgehend, die verallgemeinernden Schlußfolgerungen zieht. Sein Fußnotenmaterial beweist, daß er eingehende Lokalstudien gemacht hat. In dem vorliegenden Falle hätte er anders nicht vorgehen können. Ergänzend hat er auch die Rechtsentwicklung anderer sozialistischen Länder durchgeblickt, wodurch vergleichende Studien ermöglicht wurden. Das russische und deutsche Inhaltsverzeichnis kann auch die ausländischen Leser in den bearbeiteten Themenkreisen zurechtweisen.

L. Trócsányi

Hamza, G.: Die gewillkürte Vertretung*

Trotz seines ziemlich jungen Alters ist der Verfasser ein sowohl in Ungarn als auch im Ausland bekannter Experte der Rechtswissenschaft, hauptsächlich der Rechte der antiken Welt, darunter des römischen Rechts. Über seine Tätigkeit geben seine zahlreichen bisher veröffentlichten Studien Rechenschaft, daneben hat er an mehreren im Ausland veranstalteten wissenschaftlichen Kongressen teilgenommen. Ob an diesen Kongressen oder auf die Aufforderung ausländischer Universitäte in der Organisierung der dortigen Institute für römisches Recht gehalten, seine Vorträge haben sich großen Beifalls erfreut. Nicht nur die Ergebnisse des wissenschaftlichen Lebens in Ungarn sind dadurch vermehrt worden, diese Vorträge haben auch zur Erweiterung unserer ausländischen Beziehungen auf dem Gebiet der Rechtswissenschaften beigetragen.

In seinem neulich veröffentlichten Werk, aus dem einige Einzelheiten bereits als Aufsätze publiziert worden sind, bemüht sich der Verfasser, die in den Rechtssystemen der verschiedenen geschichtlichen Perioden eingenommene Stelle der gewillkürten Vertretung zu beleuchten und bekanntzumachen. Wie es sogar aus dem Untertitel des Werks hervorgeht, beschäftigt sich der Verfasser mit den dogmatischen und theoretischen Forschungen bezüglich dieses Rechtsinstituts sowie mit deren Ergebnissen, um auf diese Weise die geschichtliche Entwicklung dieser Rechtseinrichtung von der antiken Welt bis zu unserem Zeitalter darzustellen.

In erster Linie stützt sich das Werk auf das römische Recht. Der Verfasser schließt sich einer wissenschaftlichen Richtung an, die unter Berücksichtigung der Rechte der antiken Welt — vor allem des römischen Rechts — die Aufdeckung eines zwischen den antiken Rechten und den modernen Rechtssystemen, den heutzutage geltenden Rechten bestehenden Zusammenhangs in der Entwicklung bezweckt. In diesem weitumfassenden Werk wird die geschichtliche Entwicklung der gewillkürten Vertretung durch verschiedene Rechtssysteme der Vergangenheit bis zu unseren Tagen verarbeitet. In dieser Hinsicht ist diese Arbeit sogar langentbehrt.

Während der Verarbeitung stoß der Verfasser auf mehrerer Schwierigkeiten. Eine der größten war — wie auch von ihm selbst erwähnt — die Tatsache, daß die sich auf die Vertretung beziehenden Regeln in keinem der antiken Rechtssysteme in einem separaten Abschnitt enthalten sind, d. h. es gibt keine das Rechtsregelmaterial einheitlich und übersehbar angebende „sedes materiae", die zur Bearbeitung des Themas benötigten Regeln sind aus dem Bereich des Personen-, Sachen-, Obligationen-, Erbsowie des Prozeßrechtes anzusammeln. Darüber hinaus ist neben den juristischen Quellen auch die Benutzung von nichtjuristischen Quellen

* Hamza, G.: Az ügyleti képviselet. Dogmatikai és elméleti vizsgálatok az antik jogoktól napjainkig. (Die gewillkürte Vertretung. Theoretische und dogmatische Untersuchungen von den antiken Rechten bis zu den modernen Rechten). Akadémiai Kiadó, Budapest, 1982. 243 p.

unvermeidlich. Während der Untersuchung und Auswertung der lateinischen Quellentexte waren ja auch die Ergebnisse der Interpolationenforschungsmethode und über dies alles die griechischsprachigen Papyrusfunde nicht außer acht zu lassen.

Die Forschungsmethode des Verfassers beruht auf der im allgemeinen akzeptierten Ansicht, daß in der Welt des römischen Rechts die indirekte Vertretung zur Geltung kam, während die direkte Vertretung dem Reichsrecht unbekannt war und allein bei dem Besitzerwerb vorkam. Die Meinung, wonach die direkte Vertretung bei den Römern irgendeinem Verbot zuwiderlief, wird aber in Abrede gestellt. Der Verfasser meint, es gab kein prinzipielles Verbot, die direkte Vertretung war jedoch wegen der Struktur der römischen Familie und des Rechtsinstituts des Sklavenhaltertums überflüssig. Die Entstehung der direkten Vertretung ist der Ansicht des Verfassers nach mit den gegebenen gesellschaftlich-wirtschaftlichen Verhältnissen verbunden.

Abschnitt I des Buches (pp. 11—52) beschäftigt sich mit Fragen, die sich im Zusammenhang mit der gewillkürten Vertretung in den modernen Rechtssystemen ergeben haben. Es handelt sich um sich während der Entwicklung der gewillkürten Vertretung erhobene theoretische Fragen; die indirekte und die direkte Vertretung; die betreffenden positiven Rechtsregeln und die damit verbundene Rechtspraxis sowie alle Probleme, die sich einerseits aus dem inneren Verhältnis der betroffenen Parteien, andererseits aus dessen Zusammenhang mit der Vertretung ergeben; ferner um die Lösungen dieser Probleme. In diesem Rahmen werden die einzelnen europäischen Kontinentalrechte bzw. die anglo—amerikanischen Rechtssysteme untersucht. Aufgrund der Durchsicht der theoretischen und der positivrechtlichen Lösungsvarianten ergeben die in den positiven Rechten geltenden Konstruktionen die Ausgangsbasis zur Analyse der geschichtlichen Entstehung der gewillkürten Vertretung und der Entwicklung, die das Rechtsinstitut der Vertretung in den Rechtssystemen der vergangenen Zeiten überstanden hat.

In Abschnitt II (pp. 53—118) untersucht der Verfasser auf Einzelheiten eingehend die Entwicklung der gewillkürten Vertretung in den Rechtssystemen der antiken orientalen Mittelmeerländer. Hierbei werden die Rechtsinstitute der Vertretung im altägyptischen, im babylonisch-assyrischen, im antiken griechischen, im hellenistischen ägyptischen sowie im koptischen Recht einzeln in Augenschein genommen. In diesen Teilen seines Werks verarbeitet der Verfasser die Ergebnisse jener Forschungen, die auf diesem Gebiet bisher geführt worden sind. Über die dafür benutzten Quellen berichtet der Verfasser in den Fußnoten, die sich für das Thema interessierenden Lesern auch als Information für eventuelle weitere Forschungen dienen können.

Wie umfangreich das in der Abhandlung bearbeitete Material auch ist, erschöpfend können wir es nicht nennen. Über die in der Monographie behandelten Rechte hinaus sind auch das syrisch-persische, das armenische, das äthiopische, das jüdische sowie das muslimische Recht zu den Rechten der antiken orientalen Mittelmeerländer zu zählen. Diese Rechte des antiken Orients waren nämlich laut des originalen Studienplans früher an der neben der juristischen Fakultät der Universität zu Rom organisierten „Scuola di perfezionamento di diritto romano e di diritti orientali mediterranei" vorgetragen. Bezüglich all dies steht ein reiches literarisches und Quellenmaterial zur Verfügung. Es genügt auf folgende Beispiele hinzuweisen: in Bezug auf Äthiopien die Sammlung bekannt als Fetha Nagasti, die in der ersten Hälfte unseres Jahrhunderts noch tatsächlich angewandt wurde; bezüglich des jüdischen Rechts die nach der Thora entstandenen Mischna, Gemara und der Talmud, der eine Zusammenfassung (Kodifikation) des jüdischen Rechts war sowie die Tätigkeit der Rabbinerschulen; was die Moslems betrifft, der Koran und das sich danach entwickelte Rechtssystem, worüber auch eine ausgedehnte Literatur verfügbar ist. Diese Quellen durchstudieren ist selbst dann zweckmäßig, wenn wir daraus zur Beleuchtung der Entwicklung des Vertretungsrechts vielleicht keine besondere Lehre ziehen können.

Auf diese Quellen konnte der Verfasser — sicherlich wegen des ohnehin großen Umfangs des bearbeiteten Materials — nicht eingehen, er mußte sich mit jenen Rechtssystemen des antiken

Orients begnügen, über die er in seiner Monographie Rechenschaft gibt. Es waren nämlich diese, die in den engsten Kontakt mit der römischen Welt kamen, die die bedeutendste Rolle in der Entwicklung der Rechte der modernen Welt — und darunter des Rechtsinstituts der Vertretung — spielte.

In dem das ägyptische Recht erörternden Teil des Buches (pp. 65—74) wird die Ansicht des Verfassers zum Ausdruck gebracht, wonach im Zeitalter des späten Reiches durch den Vorstoß des Geschäftswillens der Grund der Konstruktion der direkten Vertretung geschafft war. Diese Feststellung des Verfassers scheint das Ergebnis einer zu umständlichen Folgerung zu sein.

In dem sich mit dem babylonisch-assyrischen Recht befassenden Teil des Werks (pp. 74—81) stellt der Verfasser fest, daß die neubabylonischen gesellschaftlich-wirtschaftlichen Verhältnisse die Entwicklung der direkten gewillkürten Vertretung günstig beeinflußten. Die Entwicklung war doch nicht möglich, da die Sklaven — trotz der Steigerung ihrer finanziellen Selbständigkeit — in einer Abhängigkeitsbeziehung blieben. Ihre Aufgabe war demzufolge im wesentlichen lediglich Nachrichtenübermittlung. Unter gewaltfreien Personen kam dagegen das Surrogationsprinzip zur Geltung, wodurch sogar die indirekte Vertretung überflüssig wurde. Der Verfasser beschäftigt sich verhältnismäßig eingehend mit der Bedeutung des Prinzips der notwendigen Entgeltlichkeit sowie des Prinzips der Zweckverfügung im Zusammenhang mit der gewillkürten Vertretung, jedoch ohne Angabe einer kurzen, leicht verstehbaren Definition der beiden Prinzipien.

In dem das antike griechische Recht behandelnden Teil der Arbeit (pp. 86—106) bemüht sich der Verfasser die zunehmende Bedeutung des Willens aufgrund mehrerer Papyri darzustellen. In diesem Zusammenhang wird die Aufmerksamkeit auf die Rolle der „systasis" gerichtet, die ein Mittel der Konstruktion der Bevollmächtigung und dadurch sogar ein Mittel der Verwirklichung der Vertretung sein mochte. Das fehlende Definieren des Begriffs „systasis" kann auch hier zu Schwierigkeiten führen. Die Nichtanerkennung der Bedeutung des Willens muß übrigens auch in dem antiken griechischen Recht die Entstehung der indirekten Vertretung zur Folge haben.

In dem Teil über das Recht des hellenistischen Ägyptens (pp. 107—112) legt der Verfasser dar, daß die in dem modernen Sinne genommene gewillkürte Vertretung in diesem Recht unbekannt war und sich auf diesem Gebiet kein wesentlicher Fortschritt in der Entwicklung zeigte. In dem das koptische Recht erörternden Teil (pp. 113—118) stellt der Verfasser — aufgrund der Analyse der einschlägigen Papyrusfunde — fest, daß da nur die Geltung der indirekten Vertretung nachgewiesen werden kann und die Geltung der direkten Vertretung nicht möglich war.

Ein besonders wertvoller Teil des Werkes ist zweifelsohne Abschnitt III. Auf seine eigenen Forschungen gründend befaßt sich hier der Autor mit der Entwicklung der Vertretung in dem römischen Recht (pp. 119—179). Auf dem Gebiet des Rechtserwerbs durch den Vertreter und der schuldbefreienden Leistung kam auch in dem römischen Recht die Konstruktion der indirekten Vertretung zur Geltung. Die Rechtsfolgen der indirekten Vertretung waren aber in anderen Bereichen auch nicht grundsätzlich ausgeschlossen, sondern eher zwecks Wahrung der Interessen der Dritten (D.14.1.1.18 — Ulpian). Die sog. adjektizischen Klagen: die „actio quod iussu", die „actio exercitoria", die „actio institoria" sowie der Zusammenhang in der Entwicklung der beiden letzteren werden hier eingehend untersucht. Der Verfasser stellt fest, daß die Möglichkeit der Verpflichtung durch Personen freier Rechtsstellung zuerst vom „exercitor" und dann — wegen handelspolitischer Interessen — vom „institor" anerkannt wurde. Was die „praepositio" betrifft, deren Grund ergab das Über- bzw. Unterordnungsverhältnis zwischen dem Unternehmer und dem „praepositus". Die Tatsache, daß der in der „praepositio" zum Ausdruck kommende Wille allgemeiner Art konkreter wurde, d. h. die in den einzelnen Geschäftsabschlüssen gespielte Rolle dieses Willens erschuf der Ansicht des Verfassers nach die Möglichkeit der Vertretung im Geschäftsabschlußwillen (Siehe vor allem pp. 142—157).

Nach alledem kommt der Verfasser zur Behandlung der „procuratio", deren erste Form

seiner Meinung nach die „negotiorum gestio" (D.17.150.pr. — Celsus, D.27.3.3., D.34.3.8.6. — Pomponius) war, deren Stelle im 2. Jahrhundert das „mandatum" einnahm (D.17.1.41. — Julian, D.15.3.17.pr., D.21.1.51.1., D.17.1.34.pr. — Africanus). Das „mandatum", das auch Ermächtigung bedeutete, stand der „praepositio" nahe, es drückte das Verhältnis zwischen den Parteien freier Rechtsstellung aus, entsprach aber auch in der Beziehung von in Über- bzw. Unterordnungsverhältnis stehenden Parteien seinem Zweck (D.17.1.6.6. — Julian-Ulpian). Die im Laufe des 2. Jahrhunderts erfolgte Annäherung der sozialen Stellung des „procurator" und des „institor" ermöglichte die Erstreckung der „actio institoria" auf den „procurator" (actio quasi institoria), was aber der Akzeptierung der Konstruktion der direkten gewillkürten Vertretung nicht gleich war.

Als Abschluß dieses Abschnittes wird die Beziehung der Rechte der antiken Welt zu den modernen Rechtssystemen in Bezug auf die gewillkürte Vertretung mit der Darstellung der römischen Entwicklung dieses Rechtsinstituts veranschaulicht. Auf diese Weise wird der geschichtliche Zusammenhang der antiken gewillkürten Vertretung mit dem entsprechenden modernen Rechtsinstitut nachgewiesen (Siehe pp. 158—179).

Im Abschnitt IV des Buches geht es um die Erscheinung der gewillkürten Vertretung in den Rechtsquellen des romanisierten Ägyptens. Das Thema wird aufgrund mehrerer, aus diesem Zeitalter stammenden Papyri (P. Amh. 90, P. Oxy. 501, 261, 94, 505, P. S. I. 1035, BGU 300, P. Mert. 18) analysiert. Auch in diesen kommt die „systasis" vor, was der Ansicht des Verfassers nach nicht als eine Bevollmächtigung im modernen Sinne zu betrachten ist, da diese lediglich eine Empfehlung ist. Die Anerkennung der direkten gewillkürten Vertretung hätte trotzdem dadurch gesichert werden können, auch wenn es nicht dazu kam. Im wesentlichen dienen die Auseinandersetzungen im Abschnitt IV zur Ergänzung des sich auf die Entwicklung der Vertretung bei den Römern beziehenden Abschnitts III und treffen daran.

Über den in der inhaltlichen Besprechung Vorgebrachten hinaus ist noch folgendes zu erwähnen:

Der Feststellung des Verfassers, nämlich daß Riccobono hinsichtlich der direkten gewillkürten Vertretung zu den Folgern von Savigny zu zählen sei (p. 120), müssen wir hinzufügen, daß Riccobono die Anerkennung der direkten Vertretung mit dem Kognitionverfahren in Zusammenhang brachte (Fasi e fattori dell'evoluzione del diritto romano. Mélanges Cornil II. 1926. pp. 270—271).

Bei der Untersuchung der Abstammung der „actio exercitoria" und der „actio institoria" kommt es zum Vergleich der „praepositio" und das „iussum". Aus dem Vergleich zieht der Verfasser — Claus' Ansicht bestimmend — die Folgerung, daß das „iussum" der modernen Bevollmächtigung nahesteht, während die „praepositio" im allgemeinen ein sog. „factum concludens" ist (p. 182). Im wesentlichen ist die Feststellung des Verfassers, daß die „praepositio" die Gelegenheit der Vertretung hinsichtlich des auf den Geschäftsabschluß zielenden Willens schafft, damit verbunden (p. 156). Wir müssen aber in Frage stellen, ob das Verhalten des Unternehmers — ohne eine ausdrückliche, diesbezügliche Äußerung — hätte genug sein können, um anderen Personen freier Rechtsstellung das Recht einzuräumen, ihn verpflichtende Rechtsgeschäfte abzuschließen.

Wo der Verfasser die „procuratio" dem „mandatum" gegenüberstellt (p. 164), ist der Unterschied zwischen Beauftragung und Bevollmächtigung in seinen Auseinandersetzungen fast verschwommen. Die beiden Rechtsinstitute sollten — obwohl sie in Bezug auf die Vertretung zusammen erscheinen — voneinander kategorisch abgegrenzt werden. Die Beauftragung bezieht sich auf das innere Verhältnis zwischen dem Auftraggeber und dem Beauftragten, die Bevollmächtigung ist dagegen eine an den Vertreter und an Drittpersonen gerichtete Äußerung. Bei der Erörterung der „actio ad exemplum institoriae" (p. 165) wird übrigens dieser Unterschied vom Verfasser berücksichtigt.

Gelegentlich der sich auf dogmatische Fragen des Rechts der Papyri beziehenden Auseinandersetzungen im Zusammenhang mit der gewillkürten Vertretung (p. 180 et seq.) läßt sich fragen, ob es nicht einfacher gewesen wäre, die die aus Ägypten stammenden Papyrusfunde

analysierenden Teile des Buches (pp. 107—111) in einem einzigen Abschnitt zusammenzufassen.

Diese Bemerkungen können aber den Wert der Arbeit des Autors nicht vermindern. Im Buch wird ein aus dem Standpunkt der Rechtsgeschichte aus besonders interessantes Thema analysiert, das in seiner Gänze bisher noch nicht bearbeitet wurde. Aufgrund eines weiten Quellenmaterials stellte der Verfasser die Entwicklung der gewillkürten Vertretung dar von der antiken Welt bis zu unseren Tagen. Als Ergebnis seiner Forschungen wird man über die gewillkürte Vertretung in der antiken Welt — vorzüglich bei den Römern — eine Vorstellung haben, die von der aufgrund der bis heute vorherrschenden Lehre bisher geltenden Vorstellung in vielen Hinsichten abweicht. Die größte Abweichung ist die Feststellung, daß in der römischen Welt gar kein rechtliches Verbot bestand, das der direkten Vertretung den Weg vertreten hätte.

Nach der Aufdeckung und der eingehenden Untersuchung der Quellen legt der Verfasser seine eigene Ansicht sicher und in entsprechender Weise dokumentiert dar. Bei der Darstellung der geschichtlichen Entwicklung wird auch die wirtschaftlich-gesellschaftliche Entwicklung in Betracht genommen. Der Verfasser stellt dar, was für eine Rolle diese in der Entstehung und in der Entwicklung der Vertretung in den einzelnen geschichtlichen Perioden spielte.

Der Verfasser betrachtete die Bestrebung, die geschichtliche Entwicklung des Rechtsinstitutes der gewillkürten Vertretung mit theoretischer Reinheit zu bearbeiten und darzustellen, als einen Zweck seiner Arbeit. Seine Auseinandersetzungen können auch hinsichtlich der Anwendung der sich auf die Vertretung beziehenden Rechtsregeln in §§ 219—225 des Gesetzes IV vom Jahre 1977 über die Modifizierung und den Einheitstext des Bürgerlichen Gesetzbuches bzw. hinsichtlich der Entwicklung der mit diesen Rechtsregeln verbundenen Praxis gut gebraucht werden und als Auskunft dienen. Über seinem sich in der Rechtsgeschichte und in der vergleichenden Rechtswissenschaft zeigenden Wert hinaus mag das Buch deshalb auch die Gestaltung der Gerichtspraxis beeinflussen und es ist auch in dieser Hinsicht bemerkenswert.

Das Werk ist mit einer deutschsprachigen Zusammenfassung ergänzt, wodurch der Inhalt auch den die ungarische Sprache nicht beherrschenden Ausländern bekannt werden kann. Obwohl die Zusammenfassung verhältnismäßig erschöpfend ist, wäre es zweckmäßig, das Buch in einer anderen Fremdsprache zu veröffentlichen, damit dieses in seiner Art einzigartige Werk auch über unsere Grenzen in seinem vollen Umfang bekannt wird. Dadurch ließe sich auch die Zusammenarbeit unseres wissenschaftlichen Lebens mit dem Ausland vertiefen.

K. Visky

The past and trends of development of the theory of law in Hungary

The thorough knowledge of facts is the basis of all analyses of actual situations. If we are intent to render account of intellectual performances embodied by books, papers, etc., their proper survey is impossible unless we have recourse to an appropriate bibliographical apparatus. On this consideration Hungarian legal and administrative sciences may boast of a preferential position to an extent of which even one does not seem to be fully aware. Legal and administrative sciences in Hungary and their foremost workshop at the Institute of Legal and Administrative Sciences of the Hungarian Academy of Sciences are not in want of successes and may look into the future with full confidence. Still the statement may be made that one of the Institute's most lasting enterprise is associated with the name and endeavours of L. Nagy, who with the series of his bibliographies has become the faithful chronicler of

Hungarian achievements in this field in the years following upon 1945. With his series he has presented works of reference for both Hungarian students of law (*Állam- és jogtudományi bibliográfia 1945* — Budapest; Közgazdasági és Jogi Könyvkiadó, 1954 —) and international scientific community (*Bibliography of Hungarian Legal Literature 1945–1965*, Budapest: Akadémiai Kiadó, 1966; 'Hungarian legal bibliography' *Acta Juridica* 1964 —). In the long run this undertaking is of such a significance in the treatment of our intellectual heritage that it is only to be regretted that for want of incentive and attendance no similar work was complied of the achievement of Hungarian legal and administrative sciences in the era preceding the World War II.

The bibliography is not the synonym of superfluity, ostensible performance, or negligible auxiliary activity, but an indispensable means of all research work in want of which actual values may be doomed to voidness. It is borne out by the total lack of a similar bibliography, e.g., of the period between the two world wars. As a matter of fact, the compilation of such a bibliography was in progress after the lapse of scarcely a decade following upon the closure of the period with the personal aid and assistance of prominent survivors, notwithstanding the work could not be completed for reasons beyond the control of those taking a part in it. And the result may safely be regarded as the burial of values, i.e. the consignment to decay of a considerable part of our cultural heritage in the field of Hungarian legal and administrative sciences. For practical purposes, notably, from the rich body of the literature published some decades ago only a part has been processed, the part which earlier was individually entered under catalogues of Hungarian professional libraries or was published in the form of reprints. Unfortunately even the only work which has undertaken the critical survey of the heritage is rich of lacks and so cannot be considered wholly exceptional to this statement. Imre Szabó: *A burzsoá állam- és jogbölcselet Magyarországon*, (Budapest: Akadémiai Kiadó, 1955 and 1980).

Now without the background of a publishing house, a private initiating of a Hungarian university has provided the facilities for forming a picture of the past three decades of Hungarian theory of state and law in the form of a bibliography. For the professional the work is a uniquely exciting lecture. Anybody interested in the subject matter may take in hand a complete compilation of the data of the common discipline. Since it is a case of a publication at the same time in Hungarian, English and Russian it seems to be an appropriate work of reference for both the international research centers and domestic libraries of social sciences to provide reliable information on Hungarian literature. It was hardly a spectacular anniversary that prompted the chair of jurisprudence of the University of Szeged to embark upon this venture, filling a gap and arousing the interest in Hungarian achievements: thirty years have elapsed since, in the wake of a decisive turning point in the history of the country, a new discipline has sprung up, namely the instruction of jurisprudence based on Marxist doctrine.

The tribute for the initiative of the work is due to I. Papp, whereas L. Nagy has contributed with his versatility in bibliography to the undertaking (*Magyar állam- és jogelméleti bibliográfia — Hungarian Literature of Theory of State and Law — Vengerskaya literatura po teorii gosudarstva i prava 1950–1980* comp. — I. Papp, ed. L. Nagy, Szeged: Chair of Theory of State and Law of the Faculty of Law of the University of József Attila, 1980, 202 p.). The result is a bibliography consisting of a foreword and 1121 entries closing with an index of authors with one of their works. In this bibliography, literature of three decades has been compiled, a literature surveyed neither by L. Nagy's earlier English language bibliography nor by his other series of bibliographies as to its more contemporary, i.e. more considerable part.

Merely turning, the pages of the bibliography prompts the reader to survey the situation of the discipline. Now I think that if we are to characterize the state and tendencies of development of the theory of law in Hungary, the character of the renewal at any time may best be reflected by a division into periods. According to it the first one extends from the appearance of Marxist legal theory up to the mid-sixties, presenting its results in the collection of papers of *Kritikai tanulmányok a modern polgári*

jogelméletről — Critical studies of modern bourgeois theory of law, Budapest: Akadémiai Kiadó 1963); the second one extends up to the end of the seventies with results most adequately embodied by the *Állam- és Jogtudományi Enciklopédia — Encyclopedia of legal and administrative sciences* (Budapest: Akadémiai Kiadó, 1980.) and the third period lasts to the present age and holds out definite aims, traits, and promises of future development.

As regards the *first period*, its primary task was to mark out the dividing line, i.e. the departure from the foregoing way of thinking, and to lay the foundations of a new one. We could hardly disregard, however, that what had put the stamp on the legal thinking of the period in question was not only an infantile disorder associated with the launching of something new or a neurotic symptom tempting to exaggeration, but also the encounter of all these with the political, social and ideological effect summed up in the nomination of the 'cult of personality'. According to the philosopher Gy. Lukács, this development indicated the rock bottom underlying dangerous processes in Marxist thinking, in the field of law manifesting itself as the autocracy of Vyshinski's normativism. Hence Marxist theory of law parted company with the foregoing tendencies in a way that its critique too often took on a labelling character; it has laid the foundation of the system in a way that for the analysis searching for the particularity of the subject it substituted a method providing evidence for a universally approved doctrine; instead of a real solution, verbal answers have come to the fore; and the outlook to the future has been permeated by some sort of utopianism. All this has been organized into a theoretically coherent entity by the circumstance that according to its very core a voluntaristic policy provided the foundations. In the field of law this policy made use of definite preconditions of legal policy and formulated the ancillary role of legal thinking to lend these preconditions a theoretical framework. Hence legal theory could not advance any further than waging a battle for its relatively autonomous existence and for laying the foundations of a relatively independent theory. Consequently, its relationship to the actual legal policy has become its underlying dilemma, namely the tendency to take note of the preconditions of legal policy not merely as axiomatic starting points but to make these too the subject matter of theoretical work. In this respect it has produced evidence of its fertility and could achieve some successes, first of all — even if for the time being merely as an outlook — in the recognition of the philosophical approach to legal theory and, in an even more accentuated manner, in the recognition of the sociological approach.

The most conspicuous characteristic of the legal theory of the *second period* is that approaches with backgrounds originating from deviating ends have gained recognition within the theory of law and also relative autonomy on the level of partial analyses. Not only the philosophical and sociological investigations, in the first period still winging the flight, have set out on a path of spectacular growth by shaping legal thinking, but also the processing of legal problems on logical, cybernetical, or doctrinal considerations has made its appearance. Last but not least the comparative method has gained full rights and become general. This development has within the sphere of legal theory entailed the claim to shaping a universally valid theory. On the whole the outlines of a theory of law begin to take shape which, relying on independent research work, presents its subject-matter in its logical and historical unity. For the philosophical approach, so far indistinct vistas open up by throwing out the aspect of value. The sociological approach to law in the wake of its own research work arrives at results which appear to be appropriate for both the formation of an outlook of its own and leading back to legal thinking as a whole. Finally, logical approach in the guise of deontic logic begins to develop as a separate discipline, at the same time its basic problems are discussed as integrated into the context of philosophical and sociological approach. All this leads within a brief spell of time to tendencies towards a comprehensive synthesis: partly to the laying of the foundations of a social science theory of law, partly to the ontological reconstruction of legal phenomenon; at the same time sociological approach to law develops to a comprehensive system of ideas bringing its own synthetizing summation.

Beyond the creative exploitation of departing approaches, this period compared to the one before is spectacularly characterized by the fact that it makes use of critique as a chance for enrichment of ideas rather than for thrusting out of their position. The critical overcoming in conformity with its principles takes place within the framework of discussion, which in its search for a solution excercises not merely a delimiting function but ensures the development of theory itself and the opening of the channels of feedback. The bright spots of approaches are wanting in a single respect only: in the unrevelling of the phenomena in their real historicity and in the foundations of historicity of research as a whole and so also of the individual approaches. Historicity is though presented unbroken is still often a conventional phrase. That theory should be built up base historically is often impeded by the allurement resting on ingrained habit according to which the historical additive should be accepted as a colouring, or supplementary, material to the intuitively achieved results.

Essentially the *third period* is but an attempt made for the revival of Marxism as has been laid down by the posthumous work of the late classic of Marxist philosophy Gy. Lukács, closing down his philosophical oeuvre and at the same time lending new dimensions to it. If we bear in mind that in the Lukácsian meaning this revival is but the repetition, on the level of the present age and in the possession of the research experiences accumulated during a century, of the analysis carried out by Marx and Engels and its extension to areas left untouched by them—this period may in fact be regarded as the beginning of research in the truly Marxist sense of the word, i.e. as one actually enforcing the unity of logical and historical aspects, unrevelling the connections of the phenomena and their laws of motion from their historical context and, in this way considering social phenomena in their very complexity as made up of mutual connections. Thus in theoretical legal thinking research work setting out from specific points of view must gain in strength by performing partial analysis in a way to find yet firmer foundations for their own theoretical system and at the same time to provide the facilities for synthesis with other approaches on yet higher, and more universal, standards. In theory of law it presupposes the simultaneous reinforcement of all approaches referred to earlier, for philosophical foundations for any research work proper are indispensable which arrive at the analysis of the facts of the present by way of the comparative processing of the historical empirism of the past, at the specific logic of the subject matter from its historicity and in the wake of this, at the notional system, too, which may be formed into the theory of the subject in question. With special regard to the social demand of regulation of a new quality and the rationality of its theoretical background, in the theory of law the laying of the theoretical foundations of legal dogmatics and the elaboration of a theory of the basic notions of the legal system, providing a systematic synthesis of the results afforded by the doctrinal study of law, is conceived as the primary ardent task. At the same time in the third period not even the question is raised as if legal theory were the immediate ancillary of legal politics (as was the case in the first period); it does not even occur as if Marxist legal theory were confined to the theory of socialist law (like in the second period); a general theory of law, owing exactly to its theoretical nature and relative autonomy, may advance the laying of the theoretical foundations of both socialist legal policy and the theory of socialist law. In the concept of the revival of Marxism, the revival is in the last resort but the continuation of the realization of the early promise of the science of history as the sole discipline, and may be it is more realistic to-day than it was earlier.

On studying the temporal scattering of the litterary product of the theory of law, we have to render account of the extraordinary leaps and bounds research work has made:

Books	Years		
	1950′	1960′	1970′
	5%	30%	65%
Papers			
law in general	5%	25%	70%
creation of law	5%	20%	75%
application of law	5%	20%	75%

Of course here we have not the case of works but bibliographical items, i.e. the improvement of the facilities of publication and translation have a substantial role. Still much is betrayed by the fact that the product of the second decade is five times than of the first only to rise to twice this number in the following decade. Even if the bureaucratism of the management of science may inevitably reckon with formal indices, it is obvious that we do not have to strive for a growth of the one or the other progression. Still the carriers of scientific work are invariably the works produced. And yet the works may come to life only in an appropriate media, i.e. integrated into the discussions going on in international forums. The other form of feedback is the way of causal participation in legal education the proportional forms of which are not yet properly established in Hungary. In this connection merely the specific situation is worth mentioning that although the bibliography attributes 30–60% of all the items of the mentioned fields of the theory of law research and production to three members working on the staff of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences, their participation in the theoretical education of the jurists of the future generation is not bearing properly solved and waits for a future solution.

Cs. Varga

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Varia

Quelques aspects du rapport entre le développement du « droit commercial antique » et l'esclavage*

1. C'est un des loci communes qu'il n'existait pas — au moins au sens de droit modern — une branche de droit nommée comme « droit commercial » dans l'antiquité. Mais dans le même temps c'est un fait bien connu même reconnu qu'il y avait diverses institutions juridiques au domain des droits antiques ayant une nature pareille aux certains institutions du droit commercial moderne. À titre d'exemple nous mentionnons du domain de droit romain le procurateur — affranchi omnium bonorum dont la position juridique peut être comparée avec celle du Prokurist du Code Commercial Allemende. En ce qui concerne le procurateur de condition « quasi servus » on peut mettre en parallèle sa position avec celle du Handlungsbevollmächtigte pour citer de nouveau une catégorie bien connue du Code Commercial Allemand.

2. Sans entrer dans les détails de cet ensemble des problèmes on peut constater d'une façon générale qu'il existe une ressemblence assez frappante entre les diverses institutions légales du caractère commercial des droits de l'antiquité et du droit commercial moderne.

C'est un fait généralement connu — nous le mettons en guillemets — « le droit commercial antique » de même manière que le droit commercial de nos jours n'a pas un caractère corporatif. Corollairement tous les deux se diffèrent fondamentalement du ius mercatorum des Moyen Ages non ayant ces deux un particularisme personnel[1]. Ainsi — nous semble-t-il — est bien fondée d'une façon toute théorique la comparaison entre ces domains des droits antiques et des droits modernes européens. Cette comparaison terminologique est bien sur facilitée par le fait qu'il n'y a pas — généralement — telles formes de caractère indigène dans cette sphère qu'exclurait la possibilité de faire des parallèles. Il s'agit ici de cette circonstance que les diverses institutions juridiques de caractère commercial se sont — par la suite du changement des conditions économiques et sociales — transformées et adaptées aux tendances dominantes de la vie économique.

L'adaptation du droit à l'économie n'est nullement un phénomène moderne, propre à notre époque. Cette adaptation continuelle se fait visible spécialement dans le domain des institutions juridiques de caractère commercial dans l'antiquité. La rapidité et la particularité seules de l'évolution des institutions commerciales de nos jours et les conséquences qui en résultent sont les faits nouveaux. Il faut constater que la diversité des institutions antiques de caractère commercial dans les conditions économiques primitives est infiniment minime par rapport aux droits modernes due — selon notre avis — au même système sociale. Pour ce motif peut être attribué un rôle décisif à

* Texte d'une communication présentée à la XXXIV[e] session de la Société Internationale « Fernand de Visscher » pour l'histoire des droits de l'Antiquité le 17 septembre 1980 à Bruxelles. Le texte n'était ni remanié ni élargi sauf les notes les plus nécessaires.

[1] Cette affirmation n'est pas en contradiction avec le fait que quelques institutions — par exemple l'arrha et le prêt maritime — apparaissent presque exclusivement aux certains domaines. Cf. H. J. Wolff, Das Verhältnis von Rechtsordnungen antiker Staaten in: Zur Einheit der Rechts- und Staatswissenschaften, Freiburger Rechts- und Staatswissenschaftliche Abhandlungen vol. 27. Karlsruhe, 1967. pp. 174-175.

l'esclavage qui était caractéristique — même en considérant les très diverses formes de l'esclavage dans les sociétés antiques — pour tous les états de l'antiquité.

3. À titre d'exemple nous voudrons faire mention de quelques actes de Babylone où se peut constater que c'était souvent l'esclave qui traitait les affaires de son maître, qui prête de l'argent et qui reçoit des gages[2]. À Babylone était de coutume, d'après les actes, que les banquiers eux-mêmes furent des esclaves alors des personnes de condition dépendente. Le pécule des esclaves qu'ils possédaient était administré par eux, pour ainsi dire comme un bien propre tant qu'il restait entre leurs mains. De cette façon il constituait si bien quelque chose de distinct de la fortune du maître. Il en résulte, que les esclaves étaient à Babylone rélativement — de point de vue de l'activité commerciale — indépendants de leurs maîtres.

En étudiant la question de l'esclavage par rapport au «droit commercial» — mis de nouveau entre guillemets — on peut s'étonner de rencontrer les esclaves si souvent agissant eux-mêmes, soit au nom de leur maître, soit en leur propre nom en administrant un pécule. Dans les maisons de commerce et dans les banques se sont des esclaves qui sont pris très souvent pour employés, pour commis et alors s'ils contractent, c'est avec pleins pouvoirs, en qualité des représentants de la maison. Le droit babylonien peut être considéré comme un bon exemple de diminution de la différence entre des personnes de condition libre et des esclaves à cause de l'augmentation du rôle de la sphère économique. Les diverses formes de la dépendence — et surtout les esclaves mêmes — ont ainsi aussi contribué au développement des institutions légales de caractère commercial à Babylone.

4. En analysant le droit grec antique — et spécialement le droit attique — on peut sans doute constater qu'un des attributs de celui était la fléxibilité[3]. À cause de cette fléxibilité particulière il n'était pas mis un obstacle de caractère de principe au développement des diverses institutions légales relatives à l'activité commerciale. Il était du à cette fléxibilité qu'il n'était pas attribué un rôle exclusif à réglementation de la loi. Par cette circonstance s'explique la grande importance des coutumes à Athènes. C'est ce type de réglementation juridique qui favorisait par exemple l'activité commerciale que se manifestait en premier lieu dans le domain de commerce maritime des esclaves à Athènes. C'est un fait bien connu que à Athènes comme selon toute vraisemblance dans toute la Grèce antique le maître pouvait autoriser un ou plusieurs de ses esclaves à exercer librement une industrie[4].

Les esclaves qui se trouvaient dans cette situation étaient souvent qualifiés de *choris oikountes* parce qu'ils avaient un domicile à eux, distinct de celui de leurs maîtres. Ces esclaves pouvaient non seulement avoir leur domicile séparé à Athènes, mais encore à l'étranger ou ils se trouvaient comme représentants-agents ou gérants de leurs maîtres[5]. À titre d'exemple nous mentionnons un plaidoyer de Démosthène (C. Phorm § 5) ou Lampis comme *diopos* est chargé de commendement d'un navire, dans l'intérêt et pour le compte de son maître Dion. Il est aussi autorisé de faire des voyages à l'étranger dans le but de conclure des contracts avec tiers. À Athènes comme dans la théorie c'est admise généralement, n'était pas connue la qualité du commerçant qu'aurait été attribué à certains individus. C'était pour ainsi dire la nature, la qualité de l'affaire même qui déterminait son caractère de *dike emporike* et par conséquent il importait peu qu'elle ait été conclue par un commerçant — *emporos* — ou seulement par un simple citoyen qui importe des marchandises pour son usage personnel. Il en résulte aussi — et cela doit être considérée comme une circonstance

[2] Voir spécialement les actes dans les Archives des Murašu datant de l'époque perse (455-403 a. n. è.). Cf. G. Cardascia, Les Archives des Murašu, Paris, 1951. pp. 72 ss.

[3] Cf. H. J. Wolff, Griechische Rechtsgeschichte als Anliegen der Altertumswissenschaft in: Ellenikhé Anthropistiké Etaireia, Dietnes Kentron, Anthropistikon Klassikon Eregnon vol. 20. Athenai, 1970. pp. 155-156.

[4] Voir de manière approfondie A. E. Röhrmann, Stellvertretung im altgriechischen Recht, Diss. Würzburg, 1968. pp. 128 ss.

[5] Cf. U. E. Paoli, Il prestito marittimo nel diritto attico in: Studi di diritto attico, Firenze, 1930. pp. 105 ss.

importante — que même les contracts conclus par un *doulos emporos* alors par un *ktema ti empsychos*, pourvue que ces transactions avaient un caractère commercial, appartenaient à la sphère des *dikai emporikai*. S'il en est ainsi l'activité bien importante des esclaves ait contribué aussi au développement des *emporikoi nomoi* de droit attique.

5. Quant au droit romain il est bien connu que l'actio exercitoria et l'actio institoria comme des actions de caractère commercial — selon Valiño celles seraient des «acciones mercantiles»[6] se réferaient aussi aux esclaves exerçant une activité d'un magister navis ou celle d'un institor. En ce qui concerne ces deux actions on peut constater que l'actio exercitoria était expressément en rapport avec le commerce maritime, tant que chez l'actio institoria la seule condition requise, pour que cette action s'appliquât, c'est que le mandat ou simplement l'autorisation eut un caractère professional ou commercial. Ces deux actions paraissent, donc avoir été créées vers la deuxième moitié du II[e] siècle av. n. è. Quant'au temps de naissance ou creation de ces actions peut être acceptée la priorité de l'actio exercitoria[7]. On y est amené necessairement par ce fait que ce sont régulièrement les règles introduites pour le droit maritime qui sont les plus anciennes. Originairement étaient le magister navis et même l'exercitor de condition servile. Il en résultait que le tiers ayant conclu un contrat avec ses esclaves pouvait intenter une action directement contre le maître, le dominus servi. De cette façon était construite la base dogmatique selon laquelle le tier pouvait agir aussi bien dans le cas s'il lui avait conclus un contrat avec un magister ou un institor de condition libre.

En analysant la condition personnelle du magister navis ou de l'exercitor navis on peut conclure que celui jouissait relativement plus d'indépendance que l'institor dont l'activité était caracterisé par Livius comme «servile ministerium»[8]. Par cette condition plus libre et indépendante du préposé s'expliquait le fait que le préposant pouvait seulement dans les cas plus exceptionels acquérir des droits à la base du contrat conclu par le préposé avec tiers comme nous en témoigne le fragment d'Ulpien (D. 14. 1. 1. 18.). Dans ce fragment de base de l'acquisition des droits de l'exercitor ne sert que la décision spéciale du praefectus annonae ou praeses provinciae en voie de procédure extra ordinem[9].

À la différence de l'actio exercitoria la possibilité de l'acquisition des droits — en forme d'une action — du préposant — aussi bien que son préposé était de condition libre — était reconnue plus souvent comme nous en indiquent les sources (D. 14. 3. 1. — Marcellus-Ulpianus), D. 14. 3. 2. (Gaius) et D. 46. 5. 5. (Paulus). Ce phénomène d'importance s'explique selon notre avis par le fait que parmi les institores la proportion des esclaves était considerablement plus grande que celle des personnes de condition libre.

D'autre part n'est pas sans importance qu'on peut intenter une actio institoria contre le maître d'un institor-esclave qui s'occupe en pratique du commerce des céréales même dans le cas — comme nous en témoigne le fragment de Paulus (D. 14. 5. 8.) — si lui n'est pas autorisé pour cette activité selon sa praepositio[10]. Cette circonstance, cette particularité fait soupçonner selon

[6] E. Valiño, Las «actiones adiecticiae qualitatis» y sus relaciónes básicas en derecho romano, AHDE (38/1968) p. 356.

[7] Cf. la littérature bien abondante en cette manière: E. Costa, Le azioni exercitoria e institoria nel diritto romano, Parma, 1891. pp. 32 ss.; A. Claus, Gewillkürte Stellvertretung im Römischen Privatrecht, Berlin, 1973. pp. 81 s.; P. Huvelin, Études d'histoire du droit commercial Romain, Paris, 1929. pp. 181 ss.; G. Pugliese, In tema di «actio exercitoria» Labeo 3(1957) pp. 308 s.; S. Solazzi, L'età dell'actio exercitoria in : Scritti Solazzi, Roma, 1938-1947. pp. 243 ss.; Valiño op. cit. pp. 345 ss.

[8] Cf. Liv. 22.25.13. («...ipsum institorem mercis, filioque hoc ipso in servilia eius artis ministerium usum»).

[9] Voir l'interprétation de ce fragment dans la littérature L. Mitteis, Römisches Privatrecht bis auf die Zeit Diokletians I. Leipzig, 1908. p. 228.; Claus, op. cit. pp. 231 ss.

[10] Voir encore Claus, op. cit. pp. s.; S. Riccobono, Cognitio extra ordinem e caratteri del «ius novum» RIDA 1(1949) pp. 288 s.

notre opinion quel rôle important était attribué à l'activité commerciale par le praefectus annonae aussi bien que par l'empereur.

6. À titre de conclusion nous pouvons dire que cette communication ne contient que des fragments. Elle ne peut pas tenir compte d'une façon approfondie de tous les côtés du sujet. Mais les indications fragmentaires pris de la sphère des divers droits de l'antiquité montrent qu'il existait un rapport plus ou moins étroit entre le développement du droit commercial antique et l'esclavage. L'esclavage ait pu aussi maintes fois influencé les institutions juridiques de caractère commercial d'une façon qu'il contribuait à la formation et même au perfectionnement — en voie de sa construction spéciale — de ces institutions.

G. Hamza

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Internationalia

D'AGOSTINO, FRANCESCO: *Per un' archeologia del diritto* (Miti giuridici greci.) (Legal Archeology. Hellenic Legal Myths) Università di Catania. Pubblicazioni della Facoltà di Giurisprudenza. 84. Milan, Giuffre, 1979. 164 p.

Professor D'Agostino has dealt with primarily the ancient and medieval turns of the development of legal philosophy in his earlier works. At the same time, the author is connected to Heideggerian existentialism and catholicism (especially to Saint Augustine). In the point of intersection of interest and Weltanschauung a quite special legal philosophical work originates and a particular, extremely original product thereof is the present volume in which the author offers a definitely existentialist legal ontology under the pretext of the analysis of Hellenic myths. More precisely, and this is the most attractive intellectual characteristic of the book, D'Agostino does not conceal at all which objectives are controlling him in the interpretation of Hellenic myths; he nowhere suppresses the possibility of different philosophical interpretation but endeavours to reveal the existentialist substructure, the fundamental role of violence and fear behind the existence of law. Although the work is primarily a source of historical interpretation for those who, as the writer of this review, cannot enter fully in the spirit of the existentialist fundamental experience the general legal philosophical importance of the work cannot be contested.

The author departs from the *arche* notion of the French structuralism (Foucault) but does not apply the structuralist methodology to the legal discussion but investigates the ideas expressed therein. The investigation of *arche*, or primary experience serves the purpose to verify the intuitive statement of Heidegger, according to which the transformation of *Dasein* resulted in the coming into existence of the legal phenomenon. The author wants to develop the documentary material from the Hellenic myths, namely by the „anti-philological and anti-chronological" application of myths, in accordance with his objects. The myths prompt us to meditate on the violence which constitutes the foundations of law. In the myth not only the anxiety and fear predominating in the state before the law, the uncertainty is expressed but also the cosmic fear. The legally organized society is markedly separated from this phase; in spite of this marked separation this previous state further lives and affects in the original sin. The violence creates the law, says the author, following Girard, and the institutions are broken up by peace. The old rites become customary and banal, their real object seems to disappear — then, there is a general disorder and the destructive violence appears. The original, the creative violence is to be distinguished therefrom, in connection of which, however, the fundamental question seems to be unsolved which has its roots in one of the famous fragments of Heraclitus ("Polemos is the father and king of all things"). Following Heidegger, D'Agostino comes to the conclusion that the break causing the law is a sign for mankind: the stabilization of *dike* after the rage of violence establishes the recognition of mankind in connection with its own ontological status.

Professor D'Agostino proves his principle by means of fundamental topics taken from the very ample and ramifying relations of the Hellenic mythology. He treats the sense of fear and of dreadfulness in the man, the cosmicity thereof, the relationship between pudency and sense of justice, the presence of violence in the nature of Dionysus, the violence element present in the myths of creation, the problems of sensuality and sexuality in the mirror of myths. The most important myths treated here are: Antigone (2nd choir: *deinos* and human nature), Oedypus; Plato's Protagoras (it brings the pudency *(aidos)* and the justice *(diké)* to people without political wisdom); birth of Helene according to Kerényi; Dionysus and Pentheus (according to *Bacchantes*); the myth of androgen in

the presentation of Aristophanes (from *Symposion*); Kaineus (the invulnerable Lapith transformed from a boy to a girl).

The analysis of myths is rendered more difficult (certainly, some objects of the author are thereby facilitated) that the myths have survived in a highly fragmented or considerably rewritten from (as with Plato), therefore the interpretation is to a great extent a completion, and a re-creation, respectively. Otherwise, it is remarkable that the author, though with a high respect, refuses the neohumanistic interpretation represented especially by W. Jaeger and follows mainly Kerényi and Vernant.

The author who refuses the old question of what kind of social conditions is reflected in the myth, arrives at the conclusion that the law is not the product of human civilization. People living in a state without law live more outrageously, but are not less civilized than their descendants who base their existence on the law. After all, this conception corresponds to young Nietzsche's statement (behind the Hellenic humanism the cruelty crouches as a tiger and the Hellenic legal conception developed from the purification of the homicide). The myths lay stress on the sudden break in case of the formation of law just as in case of the foundation of towns and of the accession of kings. In our times, the research workers are highly declined to demythicization though it may be hardly true the particularity of our age would be the demythicization. "If the demythicization means the resignation from the sacral attitude of the reality, the first demythicization was carried out in paradoxical manner by the creators of myths..." by the separation of the divine from the commonplace. The demythicization does not mean a progress if it means the putting aside of the question of origin. However, the Hellenic legal myths — expounds D'Agostino — carry the message on the origin. Accordingly, the man is not born as a legal being, the law is not automatically given for the man as was held by the classical natural law. This does not mean, however, that the law would not be an ontologically established reply to such a life which would otherwise stew into the casual empiricism. The birth of the god requires therefore an *event* thereabout the myth gives information. The myth calls the attention to the initial state, moving thereby to accept the law, the myth calls the attention to the necessity of keeping the *aidos* and the *dike*, since when returning to the *hybris* of the original state, repeated wars or the punishment of Zeus are to be awaited. According to Girard the social union has taken place as an answer to the original violence. Its form (i.e. universal model) is the ritual sacrifice. Which was in the primitive societies the revenge on the scapegoat, is the legal order in the modern rationalization. But in both cases the development of a chain of revenges is prevented. As contrasted with the conception of Nietzsche, the sense of justice is therefore not the generalization of the retributive and synallagmatic mentality of the primitive men but the means of the surmounting of violence (though by proceeding to violence). "Law and justice originate from the state of the existentialist incapacity in which man finds himself" and in which he hopes that, forced in the net of norms, he can moderate the always threatening violence.

The volume is completed by an elusion ("May the man give up the aidos?") and an Appendix. In the Appendix the author applies essentially the method of the analysis of myths for the legal-social phenomena in connection with two books (*Dahrendorf:* Homo sociologicus; *Tricaud:* L'accusation) and with the problems of urban life.

A. Sajó

STRAYER, Joseph R.: *Les origines médiévales de l'Etat moderne*. Paris, Payot, 1979. 159 p.

The famous researcher of the history of the Middle Ages intends to crown his long-lasting scientific career at the Princeton University by this work which is the summary of his knowledge on the nature and functioning of Western European monarchies gathered during several decades. His developments made in form of lectures may reckon with the interest of scholars in the field or law and

public administration too, who, taking seriously the principle of historicity, characteristic of Marxism, want to gather information concerning the questions how the formation, called today the modern state, developed, and came into existence under the effect of what kind of incitements.

To advance some of his final conclusions, he states that— the institution called the modern state developed under the conditions of feudalism in 12th century France and England as a real alternative succeeding the fictious alternatives of the city-state and the empire. The first constant institutions were established as challenged by home affairs and not by foreign ones, i.e. by the jurisdiction and the finances, and the bureaucracy established for their management was the media in which the institutionalization of the state took place. The modern state could come into existence only when the sense and concept of the *loyalty to the state* developed, subordinating the familiar, local, and religious, loyalties. The concentration of human resources was made possible extensively by the appearance of the modern state. To its formation the coincidence of several preconditions was necessary: (1) some *spacial and temporal stability*, the existence of a geographical nucleus around which a certain political system could be built up. The lack of it may explain that the ancient Greeks could not establish a homogeneous state either by the coalition against the Persians or in the atmosphere produced by the Olympic Games, just as it could not succeed for the nomads; (2) the existence of *impersonal*, relatively *constant political institutions* which could survive the changes of the sovereign and of those quarreling for the power around him, drawing thereby some specialization and a higher efficiency into the political processes, strengthening in this way the political identity of the community, too. Finally, each institution being constant might become the fundament of a state formation, such as it occurred with the private corporation either of the Massachusetts community or the British India; (3) these institutions had to increase their *prestige* and *reputation*. The first decree of Westminster (1275, c.17) declares that although the royal right is invalid on the territory of the Gauls, the king, due to his sovereignty, can do all the same justice to everything. The decisive step is after all not the exercise of the monopoly of power but the recognition of the necessity of a superior authority which, as theoretically formulated, appeared around 1550; and, finally, (4) the development of the *loyalty to the state*. All these occurred between 1100 and 1600 in Western Europe (pp. 16–22).

The Greek *polis*, the Han Empire in China, or the Roman Empire were indisputably states but under such remote and different conditions that they could not serve as examples. The state had to be re-invented, and as soon as this happened, of functioned much better than the majority of the old examples. The *empires*, e.g., were militarily powerful, the political integration and the concentration of human resources were, however, imperfectly realized, consequently, the loyalty to the state could be hardly developed. In all these respects the *city-states* were more successful but they could not solve the integration of new territories (pp. 23–25).

In the opinion of the author, the *development of Christianity* and the influence of the organization of the Church, on the one hand, and the *increasing stabilization in Europe*, on the other hand, were the two factors resulting in the foundation of states. The Church acquired already in several respects the properties of state (constant institutions and sovereignty), and, as the main fact, according to its dogmas the obligation of governor was to provide for the justice and peace against those disturbing them. It was under the effect of such incentives that the institutional system of administration of justice developed for ensuring the home security and the financial institutions for ensuring the external security (pp. 30–33).

The consequence of the battle over Investitures was the consolidation of the opinion according to which the lay sovereign was the administrator of justice and the jurisdiction justified his existence. Consequently, in Western Europe the notions of state and law were interconnected and the concepts of law and right began to develop in such a way which was not any more confined to the sole criminal law.

The development of a consolidating-depersonalizing state machinery is closely connected with the use of written records since the management resting upon such bases is the guaranty both of stability and impersonality. The passing over to the use of written records was, however, connected

with formal education. In this system of education legal studies had a considerable part although the Roman law had only a negligible effect in the territories north of the Alps. Its benefit was all the same considerable since by reference to its categories and notions the elucidation of some new ideas was rendered possible. It may be supposed, e.g., that the notion of public welfare and the concept that the promotion of public welfare was the obligation of the sovereign, helped in the justification of innovations such as the general taxes (pp. 43–44.)

In the public administration the need for information conduced very soon to a bureaucratic explosion. The acquisition and processing of information increased the bureaucratic apparatus. At the same time, the information had also political value: somebody possessed the more information the greater was his chance to become an independent political factor. The sovereign not being obliged to let slip the reins of his hands, institutionalized step by step principle of *collegiality* which incited to the establishment of a managing apparatus according to special jobs, on the one hand, but without rendering them hierarchic to such an extent, that it would limit the survey of the king over the home and foreign affairs, on the other. The evidences thereof was the number of positions of under-secretaries of state which even up to the 18th century in England and France did not combine, e.g., to the position of an undersecretary of state for foreign affairs but remained independent provinces of undersecretary of state for the administration of foreign affairs of single geographical districts (p. 146).

According to the final conclusions of professor Strayer, the European state of 17th century was by no means democracy, but due to the institutionalization of the organization of the modern state it was not any more such a despotism in which only the personal will of a monarch would exist. The final outcome was the practical self-justification of the state which psychologically prepared the ground for the further, even increasing strengthening, and for the multiplication, of its functions (p. 156).

Cs. Varga

INZITARI, BRUNO: *Autonomia privata e controllo publico nel rapporto di locazione* (Private autonomy and public control in tenancy) Biblioteca di diritto privato ordinato da Pietro Rescigno Napoli, Casa editrice Dott. Eugenio Jovene, 1979. 274 p.

One of the most current questions of the Italian public life which may have almost unforeseeable political consequences, is the rent of flat. This relation attaches from the very first a great importance to the present work which can count—with good reason—with the interest of Hungarian professionals due to the Hungarian position of tenancies being similar in many respects to that in Italy. In addition to the actuality, however, the more general relation treated in the work, the Marxist analysis of the concrete process of state intervention means the surplus which makes Inzitari's book a valuable scientific work.

The author proceeds from the historical change of functions of tenancy. He follows the development of the relevant institutions from the Roman law up to the classical capitalist codification. (The Italian codes vary on the whole the Napoleonic solution.) The difference between the original solution of Roman law and the capitalist approach consists, in his opinion, primarily in that in Roman law the physical object of legal relation and not the part played by the parties in economic relation was considered. Nevertheless, the heterogeneity of economic function was not completely stated either in the codification of the 19th century, since the legislation was influenced by the striving after the typological simplification. This resulted obviously in certain contractions. The codification is, however, remarkable not only with respect to typifying but—first of all—to the statement of contractual balance. The author will, however, set just this ration of services and the social-economic consequences thereof in the centre of his analysis of the legal regulation in force. At the beginning of the 19th century, the situation was, of course, essentially simpler: the establishment of balance, and its

judicial restoration, respectively, could be imagined only in the line of volitional defect. The annullability of the contract in case of serious disproportion was inserted into the rules on the sale of immovable in the Code Civil at the explicit request of Napoleon. The reason of the rule may be found in that even at this time a fundamental social significance was attributed to the landed property. In respect of tenancies of immovables, however, the abrupt acceleration of urbanization proved to be decisive. From the point of view of the social mentality in the 19th century, the tenancy was the legal relation rendering possible also for the "wider mass" to enjoy the property, even if they had no possibility for the acquisition of property for want of financial resources. While, however, in the last century the market relations were more or less able to spontaneously arrange the housing conditions, at the outbreak of the First World War radical changes occurred. As in several other countries, also in Italy measures had to be taken for the arrangement of housing conditions of those social strata whose members were called to the arms and being unable to pay the rent. This meant essentially wagestandstill, moratorium and interdiction of notice to quit; according to the assumption of legislator, of course, only temporarily. The previous anomalies of flat tenancies brought to light just due to the war, did not stop at the end of the war and in the new political power relations when the interests of workers could not be any more completely neglected the state intervention in flat tenancies, meant previously for being temporary, remained further on. The author gives a detailed survey on the positive statutory regulation which was modified to a slight extent from year to year.

In addition to the changes in the positive law, however, neither the consideration of the economic consequences of regulation is neglected, namely that partly just under the effect of the regulation, the investments in building industry considerably diminished and as a consequence thereof the offer of tenement-dewellings recudes i.e., as against the set aim of legal regulation intending to settle the housing problem, the upset of market balance becomes more marked. (This leads, of course, to the maintenance and intensification of state intervention.) "This drawback appears in each situation when the price of product is withdrawn from the market laws. . . The legislation containing restrictions was born for the remedy of troubles in balance, actually, however, it reproduces and reinforces the conditions under which this trouble in balance took place." According to Inzitari, only the law No. 392 of 1978 means a progress since it establishes the fixing of tenancy fees on rational calculable and legally guaranteed foundations.

The author supports the above outlined general development tendency by several precise detail-analyses where he finds a chance to display his dogmatic expertness and extensive knowledge on the judicial practice. The Marxist demand for locating in the social context is, however, always present i.e. the author never taken by the legal notions analyzed by him.

While analyzing the modern tenancy institutions the author studies three questions of detail in one chapter each: the solidification of the principle emptio non tollit locatum, as the expression of exchange value of immovable property; the assumption of risk for the damage in fire of immovable property (in this respect the change of power relations could be observed already long before the outbreak of First World War); the theoretical dispute on the nature of the renter's rights.

The second part of the book deals with the crisis of the traditional civil law, caused by the state control (restriction of contractual autonomy). The traditional subjective-law view protecting the right of ownership is replaced gradually by the protection of the use and enjoyment of the hirer. This fact leads, however, to the change in the contractual balance since less and less right is due to the renter (moreover, the discrepancies of contract are null and void to the prejudice of hirer—disregarding here certain differences in the judicial practice). Therefore, also the obligations of the renter are reduced.

As a consequence of the inner structure of the Italian legal system, the regulation containing state limitations seemed to come up constantly against the Civil Code, moreover, eventually against the Constitution. In the end the Italian legal-political arrangement is based on the capitalist private ownership and the liberal conceptions of the Italian state foundation exert an influence even now on the institutional and ideological levels. The author analyzes profoundly also this problem while dealing with the practice of the Italian Constitutional Court.

According to his final conclusion, in the flat tenancy (and secondarily in the tenancy of land) the volition of parties plays an ever decreasing part. Instead of the volition the contract serves as a means of the realization of other social objects and these social objects fall beyond the microcosmic sphere of individual interests. The tenancy of flat is, instead of being the realization method on the market of the use-value of renter, partly the device of the anti-inflationary policy of the state (freezing of rent), and partly a social political device (for the solution of flat problems of strata standing in need of special protection).

A. Sajó

LEISS, WILLIAM: *Ecology versus politics in Canada.* Toronto, University of Toronto Press, 1979. 279 p.

Politics and ecology? Political ecology? These notions may give the impression of a bizarre association of ideas nowadays but two hundred years ago even political economy seemed to be a rather modern expression. The present book expounds the environmental problems of the—in terms of its territory—second largest country of the world in studies. The work helps to get acquainted with the possibilities of society in connection with the protection of the environment and the legal frames determining long-term possibilities. Ecology as a science knows interaction patterns expressing the connection between the individual man and his environment respectively among the individuals in specific parts of the environment (ecosystem). The quantitative and qualitative development of human demands manifesting itself in political pressure are harmful to the biosphere of the earth even in such a—for the time being sparsely populated—country as Canada having a territory commensurable with that of Europe.

There are two basic questions to be answered in the book: how the people's opinion and readiness to act concerning the protection of the environment is influenced by the political and social development respectively how the increasing understanding of environmental problems concerns the political compromises, which people and society have to make, now under the pressure of reasonableness, then of compulsion.

The book is a joint result of three different investigational efforts. The editors examined the social aspects of natural environment for more than three years and utilized the results of environmental research of York University. The public opinion is overwhelmed with information about the dramatic danger threatening the natural environment that assures the existence of life in earth.

A study is devoted to the insufficiences of the legal and practical means of the protection of the environment and health in Canada and in other countries. It is pointed out that industrial security can only be profitable if long-term effects are taken into consideration as momentary rentability is threatened by expensive filtering plants. Although the political importance of the environmental "lobby" has increased in recent years but the followers of unlimited growth are still superior in number both in the legislation and in other domains of political life. State institutions, among whose tasks the protection of the environment and health would be of primary importance, are also treated in the study, especially those representing up to now unknown branches of industry and particularly concerning the sensibility of public opinion (nuclear industry etc.).

"In the last decade modern society faces more and more crucial questions: the most important of them are 'pollution crisis', 'over-population and food crisis', and 'energy crisis'. The public opinion could testify that the traditional mechanism of administration with its inflexibility and excess of precaution is less and less able and willing to solve these crises or at least to begin solving them creatively." According to the study the technical development of the advanced world has reached the limits passing which would menace the civilization having created it. The Report of the Club of Rome

titled "Limits of Growth" dramatized this danger—and made it the principal theme of the 70s. The effects of its main statements on the legal aspects of environmental protection activity are treated in details by the following study scrutinizing the clashing interests of regional development and the protection of the environment and the possibilities of a reasonable compromise.

M. Udvaros

CLEGG, HUGH: *Trade Unionism under Collective Bargaining* Billing and Sons, London, 1978. 121 p.

At the Warwick University, scientific investigations concerning the practical questions of labour law have been made since the middle of twenties and in the centre of the studies the trade-union activity and the business federation of employers have been standing. This monograph surveys the activites of the trade unions in six Western countries—Australia, United States of America, Great Britain, France, Federal Republic of Germany and Sweden by means of comparative methods.

The author points out that so far it did not succeed to theoretically systematize the opinions and precepts relating to the trade unions. Sidney and Beatrice Webb have tried to summarize in theses the events and changes in Great Britain at the beginning of the century, as well as Perlman and Hoxie in the United States of America at the end of the twenties. The changes of trade-unionism, however, essentially exceeded these theses and today distinction shall be made among several trade unions in order to analyze their activities. In the course of the collective bargainings the employers and employees exercise pressure on each other in order to reach a compromise. This compromise is favourable to one or to the other party, corresponding to the prevailing power relations. The author points out that the state as employer often acts as a "sovereign" and grants to the legislation the possibility to decide alone on the salary and working conditions of her employees. Correspondingly, e.g. in the United States the federal and state employees are forced to display a lobby-activity among the legislators for protecting their interests.

The work deals also with the relations of the government and the trade unions. The British authors generally make distinction between the inner structure of trade unions and the official machinery. The work treats also—though briefly—the sociological aspects thereof, in respect of all the six countries. The political colour of the individual trade-unionisms as well as the legislative steps which contributed to the development of the today lines of force of trade unions are also analyzed.

A separate chapter deals with the tasks of trade unions of working places, with their role played in the preparation of collective bargaining contracts. In Great Britain e.g. rather strict agreement exists between the workers and managers of a considerable part of factories, primarily of public utility works. The previous monograph on "Working place and trade union" deals with the tendency which intends to transfer these comprehensive agreements also to the works in private ownership. In the majority of British works the trade-union official of the workshop, the "shop steward" means the presence of the trade union. In the United States this duty is performed by the shop committees and overseas the activity regulation of trade unions is much more thorough-going and is elaborated more detailed than in England. The same is characteristic also for Sweden, where, however, the collective bargaining contracts are discussed again from year to year. In the year under consideration, the modification of contract may be initiated only in special cases.

An exhaustive information is given about the conditions of stoppage regulated by statutory provision as well as about the strike statistics of the six countries. There is a considerable difference between Sweden and France in respect of stoppages since in Sweden the stoppage occurs seldom, but—apart from a few exceptions—they are illegal strikes, whereas in France the majority of the numerous stoppages are made legally. In Sweden the collective bargaining tends towards the

elimination of strikes and as an alternative, comprehensive negotiations replace the stoppage, whereas in France the employers do not lay particular stress upon the prevention of strikes.

Last not least, the volume deals with the various institutions of industrial democracy, with the relation of trade unions to the political parties as well as with the relation of the leaders of works to the trade unions.

M. Udvaros

Wissenschaftlich-technischer Fortschritt — Sozialistisches Recht (red. LINDEN, W.) I—II, Halle (Saale), 1981. 182+263 p.

The work published by the Martin Luther University of Halle-Wittenberg contains the lectures and discussion of the conference commonly organized by the universities of Halle and Dresden as well as the technical college "Carl Schorlemmer" of Leuna-Merseburg in September 1980. In the conference placing the relations of scientific-technical progress and the socialist law on the agenda, in addition to the wellknown experts of the GDR, representatives of other socialist countries (Czechoslovakia, Yugoslavia, Hungary, and the Soviet Union) also participated. Even a schematic review of nearly 50 lectures seems to be impossible, only the most important ones will be tried to be introduced.

Volume I contains the opening speeches. The fundamental lecture of *W. Linden* (pp. 10–113) outlines wide-ranging the relations of the field of science and technics and of the law and the—primarily theoretical but in some respects also practical—problems related thereto. The rate of scientific-technical progress, its qualitative changes, its outstanding and particular function under socialist economic-social conditions require the further consideration of several questions concerning also the function and possibilities of the law. In spite of the undeniable partial results of legal investigations—points out the author—the comprehensive, consequent conception of the legal approach is actually wanting. The author outlines a few problems held to be the most important. He briefly deals with the questions of legal cybernatics, in connection with the increasing role of cybernetics in the system of state planning and management. He refers to such significant and complex fields of the scientific-technical revolution (e.g. atomic energy, protection of environment, transplantation of organs, etc.) which justify the necessity of international legal regulation, on the one hand, and the reform of the structure of traditional legal system, on the other. According to the conception of the author, the "law of science and technics" should comprehend the management, planning, organization and regulation based on individual responsibility of the scientific-technical intellectual (immaterial) activity in the same manner as the realization of the results of this activity. He expounds the opinions developed in connection with the character of this legal field, with its proper place in a legal branch and with its independence—to be found in the first place in the Soviet and GDR theory. In this connection he touches upon the disputes relating to the "commodity character" of the intellectual activity and of its result. The legal mechanism has to serve the stimulation of creative activity, the provision for the learning and utilization and the effective protection of the achieved results. Investigating the single phases of the scientific-technical activity, of the innovation process, the author outlines the demands to be set forth the system of legal norms and institutions linked with the single phases, as well as their particularities. Thus, he deals with the questions arising in the field of the planning, co-operation and organization and in connection with the labour relations, with the significance of the contractual methods, of the stimulation and interest, of the risk and liability. He emphatically treats the problems related to the legal protection of scientific-technical results, its financial and proprietary aspects. As a final conclusion, he points out that the particularities of the field in question are in favour of its treatment as independent legal field, as so-called legal complexity and even the theoretical consequences of this reality should be drawn.

The main report was followed by four additional reports analyzing an important part-field each of the subject matter. *V. A. Rassudovsky* dealt with the legal problems emerging in connection with the state management and planning of science and technics. He surveyed and evaluated, in respect of the Soviet Union, the fundamental organizational conditions and significant legal norms of this field, the legal instruments serving the stimulation, the results achieved up to now and the problems to be solved. *R. Osterland* investigated the legal methods and means serving for the establishment, protection and realization of scientific-technical results. In this connection he dealt comprehensively with the utility and exchange value of the intellectual creations, with the special predominance in this field of the commodity-money relations. In connection with the research contracts he emphasized the particular problems of liability and guaranty (within it the warranty of title). *G. Grundmann* analyzed the legal consequences of the risk incidental to the scientific technical activity, namely the reasons and various forms of appearance of the risk. He pointed out that in the scientific-technical activity — though in different way and to a different extent, depending on the particularities of the given research field or research level—the risk is an immanent factor. With respect to the reduction of risk and the regulation of its consequences, respectively, the suitable interest and responsibility should be provided for by legal means, too. *H. Pogodda* treated in his lecture the correlations between the scientific-technical development and the legal protection of results obtained therefrom. Surveying the various categories of scientific-technical results and creations (discoveries, inventions, designs, trademarks, plant-breeding and animal breeding, technovations, know-how, software, etc.), he analyzes the forms of legal protection of such creations, emphasizing that the protective form may not be of an exclusive character (with respect to the traditional controversy, e. g. to the relation and valuation of the patent and inventor's certificate). Investigating the information functions of the protective form, the questions of the harmony of personal and social interests, he points out the necessity of legal instruments providing for the preferential management of creative activity.

Volume II. contains the material of discussions in various sections. Only a reference is made here thereto. In the section dealing with the general and special legal questions of the scientific-technical development 8 contributions, in the section dealing with the problems of planning, management and cooperation 16 contributions, in the section treating the legal questions of the international scientific-technical co-operation 7 contributions, and in the section dealing with the scientific-technical risk and—partly—with its labour-law aspects 8 contributions were made.

The ample material of the work in two volumes elucidates such generalizable theoretical questions of the socialist jurisprudence, the further consideration of which is an actual task. By the clear wording of questions and by the suggestions for solution supported by appropriate argumentation the reviewed work is a useful contribution to the solution of this task.

E. Lontai

EMINESCU, Y.: *Transformarile dreptului civil sub influenţa revoluţiei technico-ştiintifice* (Changes of civil law under the effect of scientific-technical revolution) Bucureşti, Edit. St. enciclop., 1979. 136 p.

The author has published her treaties in a small-from booklet. The author has been directed by her interest in novelty towards a certain category of substantive laws, the intellectual laws. Under the conditions of our time these laws are recognized for the benefit of creators, discoverers and inventors in each field—from the technical up to the esthetical one. The fundamental changes in the life of society, being results of intellectual creations, scientific discoveries, technical progress, influence also the domain of jurisprudence in such a way or manner that the law loses in a certain sense its legal character.

In the different articles contained in the book a common notion may be observed, namely the retirement of law from some fields of the social conditions, the abandonment of these fields by the law which in this way become eliminated from the legal regulation. In the meantime this fact is followed by such a phenomenon that in this field a lot of rules of conduct appear which, however, do not belong to the law. As formulated by the author: the scientific-technical progress transformed the direct educating function of legal norm, this fact is emphasized, consequently it caused the "delegalization" to a certain objective statute of the law. Further on, we shall confine ourselves to the publication of the titles of articles:

From the revolt of facts against the law up to the non-law;
The law becoming diversified;
Proportions of civil law and appearance of complex branches of knowledge;
Subject of economic law and the juristic person;
New contractual technics;
Protection of consumers and publicity;
Transformation of intellectual laws;
New forms of creation, multiplication of intellectual laws;
International code of conduct;
New dimensions of comparative law;
Technics of legal language;
Legal colour.

M. Lázár

MARIE KALENSKÁ, EVA NOVOTNÁ, MILAN ZAVACKÝ: *Československé pracovni právo* (Czecho-Slovakian labour law) Praha, 1980. Panorama, 400 p.

In the Czech parts of the country this will be the manual of the labour law for a long time, in Slovakia a separate manual is prepared which will be issued also in a short time.

The work of authors, corresponding to the traditional divisions of manuals, is divided into general and special parts, the proportioning within the two parts, however, contains also novel elements.

The *general part* is divided into six chapters the first of which treats the concept, object, method, task and system of Czecho-Slovakian labour law. The second chapter deals with the sources of Czecho-Slovakian labour law and with their application. In the third chapter the basic principles of Czecho-Slovakian labour law are expounded. The fourth chapter deals with the collective term domesticated in the Czecho-Slovakian law, with the relations concerning the performance of work and summarizes the essential information. Various categories are here investigated. In the first place, the individual labour relations, the apprentice relation, the relations established by agreements tending to the performance of work beyond labour relation, the relations to the co-operative of members of agricultural co-operatives and other relations are dealt with. The relations originating in connection with the participation in the management of the organization of the workers, as well as the relations between the trade union and socialist organizations belong also to this conceptual range. This means that also the relations with the socialist organization belong to the sphere of labour law. The authors range to this domain also the so-called sanctional (liability) relations, such relations in which norms of other legal branches have a part, labour relations of the members of military corps, of public prosecutors, of attorneys-at-law, of some state employees and of other categories. This ambiguous conceptual range comprises also the legal relations of social insurance. This chapter deals further on with the subject of labour relation, with the problems of representation, with the content of

labour relation (rights, obligations, concept of so-called title), moreover, this chapter treats the origin and modification of labour relations, the extinguishment of rights and obligations originating from labour relations, the provisions for rights and obligations originating from labour relations. In the fifth chapter facts relevant as for the labour law are explained. They are primarily the actions relevant from the point of view of labour law. The authors outline here the dogmatics of legal actions, and deal with the time as legal fact. The subject matter of the sixth chapter is the participation of workers in the management of economic, social and cultural life of the society as well as the role and social position of trade unions in the socialist countries.

The *special part* is actually the elucidation of the fourth chapter of the general part, with several sub-headings, within them with chapters. Under the sub-heading of individual labour relation the seventh chapter deals with the concept and kinds of labour relations (with the latter among others the period of continuance, the range and significance of the labour relation—second employment, additional employment, the subject character of employer—socialist, nonsocialist organization, individual, etc.). The eighth chapter treats the question of the coming into being, modification and extinguishment of labour relation, the ninth chapter the working time, the eleventh one the leisure time, the twelfth chapter the wages, the thirteenth chapter the indemnity to be paid in case of stoppage of work (idle time) and of other impediments of the performance of work, the fourteenth chapter the labour safety and protection of health, the fifteenth one the provision for the workers of the organization, finally the sixteenth chapter the special labour conditions of women and juveniles.

The authors characterize the relations treated under the third-heading as ones forming parts of the more important—fundamental—labour relations. The twentieth chapter introduces the relations of trade union organs which come into being with the participation of workers in the development, management and control of the activity of the organization. The authors emphasize in the first place that the workers are entitled to participate in the management of the organization, then they enumerate the relations between the trade-union organizations, and organs, respectively, and a socialist organization. They investigate the legal regulation, subjects thereof, the forms of the participation in the management. The twenty-first chapter investigates comprehensively the institution of collective labour contracts, first of all the function and significance of collective labour contracts, their subjects, content, form, validity and operation in time. Finally, this chapter explains the sanctions becoming operative in case of violation of obligations originating from the collective labour contracts.

The fourth sub-heading enumerates the relations connected with the main—fundamental—labour relations. They are primarily the liability (sanctional) relations. Here, in the first place the concept of forms of liability resulting from labour law are to be mentioned, being of two kinds, namely disciplinary and civil liability. The latter may exist both with the employing organ and with the employee. A special type of liability is the liability for unjustified material advantage (Chapter 22). Further on, the authors deal with the concept, reasons, prevention, decision of disputes originating from labour relations (chapter 23). Subsequently, the control exercised by the trade unions over the observance of labour-law provisions and the social control are treated (chapter 24). This chapter is finished by the comments on the legal relations occurring at the enforcement of the right to labour—the relations originating in connection with the regulation of the rate of employment included—as well as on the guarantees of the right to work (chapter 25).

The fifth sub-heading treats the further legal relations in which—as formulated by the chapter of sub-heading—the nationals participate in the social work. The majority of these relations—as may be read in the manual—is the political and cultural work in the course of the non-productive activity, as well as the legal decision-making activity. To this category of relations belong especially the particular cases of labour relations of public functionaries, members of armed forces, public prosecutors, members of co-operatives of attorneys-at-law, the crew of sea-going vessels (chapter 26).

The novel feature of the proportions is in the first place that the authors treat in the framework of comments on the labour relation the questions of labour discipline, working time, leisure time,

wages, indemnity due in case of stoppage of work, labour safety, care of employees, the special working conditions of women and juveniles, whereas the questions of the liability conditions, the disciplinary responsibility included, the labour disputes, the labour supervision as well as the guaranties of right to work are treated as questions connected with the labour relations. The labour relation of public functionaries as such is not separately outlined, the manual deals only with some special service relations (service relations of armed forces, public prosecutors, crew of sea-going vessels, etc.).

The manual is traditional in such sense that it places the internal relations of employing organization also to the labour law and does not want to separate the internal management relations from the subject of labour law.

The manual is completed with detailed indices.

The work is theoretically well founded and thorougly edited. It summarizes at a high level the fundamental questions of labour law, while taking into consideration also the practical requirements by publishing in a separate list the important decisions of Czecho-Slovakian courts, facilitating thereby the search. It will certainly render good service as an educational aid.

L. Trócsányi

COMMAILLE, JACQUES: *Le divorce en France. De la reforme de 1975 à la sociologie du divorce.* Notes et Etudes Documentaires. No 4478, La Documentation Française. Paris, 1978. 148 p.

A fundamental reform of the legal regulation concerning the divorce took place in 1975 in France. From the point of view of the legal sociology it was especially remarkable since the decision of the legislation was preceded by a thorough public opinion research and legal sociological analysis, moreover, the solutions chosen by the legislator were influenced to a considerable extent by the statements of legal sociologists. Among those carrying out the investigations Jacques Commaille, the author of the present volume was also to be found. He not only summarizes in this book the results of the earlier investigations but outlines the development to be expected on the basis of experiences gained since the entering into force of the law. In addition to the clarity, to be always expected from Frenchmen, but not always coming into full display, two reasons render the work of Commaille highly convincing. One of them is that he does not isolate the divorce and the relevant legal rules but considers it in connections of the operation of the institutional system of marriage. The approach is also multidimensional as the author is able to treat the legal, demographic and sociological aspects in their interrelations, where the sociological aspect becomes dominant.

In the first chapter of the book the regulation and development of the institution of divorce in France and in Europe is outlined. This process is characterized essentially by the switch over from the culpability to the objective state of affairs, in the background of which the admission of divorce in even increasing range and its social-legal acceptance are to be found. Although France can be considered progressive with her laws passed during the Revolution admitting divorce, the Restoration, however, was not at all favourable to the admission of divorce and in the last decades of the past century in the struggles with the Catholic Church the civil marriage and the admission of divorce resulted after all in a rather ambiguous situation. For a long time it was rather the judicial practice which rendered possible a certain liberalism, and finally in 1975 a radical change occurred, the most important and characteristic feature of which was the admission of divorce by mutual consent. This solution reflects essentially the demands of the French society. From legal point of view, however, it may be considered as an acceptance of solutions of other countries, since in the United States e. g., in the majority of the member states the principle of non-culpability has been accepted in divorce since 1970; in Japan a law has been enacted in 1974 according to which on the basis of a common consent of the spouses also the

administrative official can dissolve the marriage (and this method is used in 90 per cent of divorces). In the Scandinavian countries, non-fault divorce was granted since the Swedish marriage code of 1920, moreover, since 1973 Sweden has gone farther, since the spouses willing a divorce are not obliged even to disclose their reasons.

After a survey of the solutions accepted by the positive laws (the divorce process also included in which the conciliation (mediation) has an especially important role) the author deals with the demographic characteristics of the divorce in France. While in 1900 five of twenty marriages ended in a divorce, after 1975 the ratio is one to six. Among the different French districts considerable deviations are to be found in respect of the divorce rates which is logically in connection with the powerful Catholic influence to be felt in some districts. The ratio of re-marriages is is lower in France as compared to the United States and Great Britain and shows a downward tendency. In connection with the demographic data of divorcees it is remarkable that although the single greatest cohors of divorcees is that of the 25 to 29 years old, the number of divorces among peoples aged 50 to 60 years considerably increases. As compared the begetting ration of the divorcees with that of those living in marriage it becomes evident that the ratio of premarital pregnancy is higher (corresponding to the expectation) with the divorcees, whereas as regards the number of children no significant difference may be found. All the more remarkable are the differences in the social-professional composition of married and divorced people. To all appearances the employees and middle cadres are for the most part inclined to divorce, at the same time among the women lodging a divorce suit the ratio of actively employed persons is twice as high as the ratio of employed married women (68 per cent, resp. 34 per cent). Surveying the difference in age and employment of spouses it is conspicuous that relatively higher is the number of spouses among the divorced peoples where the husband is older by 5 to 9 years than his wife. In connection with the differences of occupation the available data do not render possible a more exhaustive analysis.

In his analysis of the social context of divorces the author proceeds from the social concepts conceived of the divorce. The everyday presentation of the divorce becomes more and more nonchalant, the divorce is less disapproved, less considered deviance. This fact corresponds to the general change of conception on the institution of marriage. This latter is characterized by the increasing recognition of free contacts of couples. The question is only whether the attitude changes the divorce practice or the attitudes transform under the effect of the divorce practice. According to the Durkheimian principle of normality, no special deviatory signification may be attributed to this attitude in a society where a considerable part, or even the half of the marriages ends in divorce, as e.g. in the United States. At the same time, the demographical differences (difference in age, prenuptial pregnancy etc.) do not offer sufficient explication in connection with the divorce; the increase in the divorce-rates may be understood only through the change of the institution of marriage; behind it, however, the specific problems of the middle classes and the influence of the increase of women's employment on the divorce are concealed as fundamental sociological determinants. 29 per cent of divorced women engage themselves for work after the divorce, i.e. for the majority just the fact of employment renders possible the divorce. In this connection the author analyzes the development of the ratio of divorces initiated by women, indicating considerable changes since 1884. The essence of these changes consists in that in the past 110 years, in the very first period and at present the divorces initiated by the wives have amounted to above 60 per cent, whereas after the world wars the divorces initiated by the men were characteristic.

Commaille, however, does not rest satisfied with the changes in the social structure when investigating the phenomenon of divorce, but traces the dynamic increase of proportions of divorces from the position of the family in modern society and from the particular contradiction between these two. With the decrease of the inherent economic definiteness of the marriage, the significance of marriage as partnership increases, namely the existence of such a partnership which can be terminated at any time. The family as positive emotional community should function in an industrial society which is characterized by the ideology of production, by the insistence on the consumption and

production. In an industrial society like the present the individualism, the competition and the innovation at any rate follow. They restrict, of course, the possibility of the intimate family, as of an indissoluble relation.

The new law on divorce is marked out for satisfying the increasing demand on divorce has been effective only for two years at the moment of finishing the volume and under the effect of facilities allowed by the legal rule and of tendencies asserting themselves otherwise, too, the number of divorces has increased to a considerable extent (apart from a transitional, period of stagnation observable with the introduction of all new legal rules). While in the years preceding the enactment of the law the number of divorces showed an increase of 5 to 6 per cent, an increase of 10 to 15 per cent was to be observed as compared to 1975. As a matter of fact this is, however, lower than that which would have been expected according to the experiences gained in other countries e.g. in England after the liberalization of divorces. (The prognostication reckoned with about the redoubling of the number of divorces for 1976–1977 on the basis of the British model.)

The increase in Paris of the proportion of divorces by mutual consent is especially remarkable. At the same time considerable divergences in the judicial practice and in the divorce procedure chosen by the parties are to be experienced in various districts. The judicial practice and the professional literature are far from being uniform in the judgement of the new law. Many are afraid of the exaggerated power of the judge and regard the conciliation (mediation) process as too long, whereas the attorneys at law protest against the possibility of the action of mutually chosen attorney at law.

In the summary the author points out that on the strength of the elapsed time it may not be accurately foreseen which role the new law on divorce will have in the development of the French divorces, since it is altogether unforeseeable how the relations of couples in the industrial society develop (trial marriage, sequential polygamy, extensive marriage).

A. Sajó

LIBÁNSKÝ, V.: *Mezinárodní socialistické organizace pro hospodářskou a vědeckotechnickou spolupráci* (International socialist organizations in the field of economic and scientific-technical co-operation) SNTL, Praha, 1980. 259 p.

Only when reading the book, even the persons knowing relatively more intimately the activity of CMEA realize what a wide-ranging network of organizations serving for the purpose of socialist economic integration has been already built out. Their entering in an inventory alone would be such a—useful but arduous—work which commands respect. The systematization according to uniform aspects, the concise introduction of these organizations has not yet been done in the socialist economic-legal literature, therefore, the reviewed book of V. Libánsky fills a gap, indeed.

The book is divided into two main parts, namely a "general" and a "special" part. The part I (pp. 11–36) introduces three basic types, fundamental categories of the organizational system of CMEA and—in broader sense—of the socialist economic and scientific-technical co-operation. They are as follows: international economic organizations, inter-state economic organizations and international organizations having their own finances. The author—offering a certain historical survey and based primarily on the functions and objectives contained in the Complex Program—delimits the three categories by comparative analysis, pointing to their particularities, to their common and different tasks, to the specialities of their structures and legal characters.

The "Special part" makes known—on the basis of the above-introduced categories—the organizations having a part in the economic and scientific-technical co-operation. The survey is extremely facilitated and elucidated by the uniformly used structure. All organizations are investigated on the basis of the following points of view: 1) its character (qualified according to the above categories and referring to the fact whether it is based on bi- or multi-lateral agreement); 2) date

of foundation; 3) headquarter of the organization; 4) range of the membership (the later adherences also included); 5) activity of the organization; 6) legal character of the organization (competence, questions of representation); 7) the fundamental legal documents (deed of foundation, statutes, minutes relating to the important decisions, etc.); 8) organizational structure (authorities and methods of the decision-making, operative activity, control, etc.); 9) economic questions (financing, share in the result, and bearing of loss, respectively, etc.); 10) working languages used with the activity of the organization; 11) relations of the organization to other organizations (e.g. to non-member states, etc.).

As a matter of course, Chapter 4 is the most detailed one, dealing with the CMEA itself as an interstate economic organization (pp. 39—59). Within this chapter—according to the sense—the legal documents and the questions of organizational structure are most extensively outlined. The author introduces the Executive Committee, the permanent committees and the conferences (e.g. Legal Conference), as well as the Secretariat of CMEA.

Chapter 5 offers information about the specialized inter-state economic organizations—taking the general model for basis. 17 such organizations are presented, among others the Nuclear Research Institute of Dubna, the co-operational organization of railway transportation, the international co-operation bank, Intermetall, Agromas, Interchim, Intersputnik, etc.

Chapter 6 presents pictures of 26 international economic organizations, such as Haldex, Intransmas, Interatominstrument, Interkomponent, Intertextilmas, referring only to the organizations well known also for the Hungarian public.

The concise arrangement easy to survey offers a complete and up-to-date information (up to and including 1979) on the diversity and at the same time on the conception of organizational frameworks of the more and more wide-ranging socialist integration. This volume of the sedulous revealing work by which the author collected the not always readily accessible source-material, may be only suspected; in the book only the peak of this iceberg appears. The book containing also tables facilitating the survey means an indispensable manual for all those dealing with the legal and economic questions of CMEA. The serviceableness of the book would have been increased by summaries in foreign languages.

E. Lontai

Rechtsfragen der wissenschaftlich-technischen Zusammenarbeit UdSSR-DDR (red. G. SCHÖNFELD), Staatsverlag der DDR, Berlin, 1979. 176 p.

In the field of the thorough scientific analysis of legal questions of the scientific-technical co-operation, the legal literature of the Soviet Union and the GDR has achieved considerable results. This is hardly separable from the fact that also the practice of the scientific-technical co-operation between the two states gives evidence of favourable traditions and intensive development. It is by no means a mere chance that the volume reviewed here, dealing with the legal problems of this particular field of the co-operation has been also born in the spirit of co-operation. In the authors' collective both the well-known jurists of the GDR (G. Schönfeld, M. Müller, W. Schönrath) and the representative of the Soviet jurisprudence (M. M. Boguslavsky) are to be found.

Chapter I *(G. Schönfeld)* introduces and illustrates the process and significant results and the related particularities of the scientific-technical co-operation of the USSR and GDR. It surveys the important legal documents serving for basis of the co-operation, and, with special minuteness of detail, the stipulations of the bi-lateral "General Conditions Relating to the Accomplishment of the Scientific-Technical Co-operation between the GDR and USSR" approved on June 15, 1973 by the government committees. It outlines the actual and perspective tasks of the co-operation as well as the consequences resulting therefrom as for the development of legal instruments. It emphasizes the

particular features of this field, especially that it is a complex, dynamically developing system characterized by elements of uncertainty, of risk (p. 19). It stresses the increasing importance of legal norms of macrolevel (inter-state and inter-governmental treaties), further it refers to the significance of private international law aspects of the field.

Chapter II *(W. Schönrath)* deals with the general questions of the legal mechanism of scientific-technical co-operation. Taking the theses of the Complex Program for basis, it defines the main fields of the co-operational relations, namely: establishment of scientific-technical results, the exchange of the results, the learning of the produced results and their economic exploitation, realization. Further on, it investigates three legally significant fields of mechanisms. First, it analyzes the legal conditions and methods of the co-operation necessary with respect to the planning, namely the variants of planning co-operation (plan co-ordination and common planning), the characteristics and tasks of the legal subjects playing a role (in special consideration of the position of international organizations), the external phases of the legal mechanism of planning (the most significant phase thereof is the co-ordination of the five-year plans). The next range of questions dealt with in more details relates to the legal means serving for the learning of produced results. In this connection it surveys the variants of the achieved results, the particularities of their legal protection, laying stress on that the blocking effect of exclusive title granted to inventions is not compatible with the essence of the socialist integration (p. 39). It calls the attention also to the special problems of know-how. Finally, it briefly touches upon the solution methods of possible conflicts, namely the arbitration.

Chapter III *(M. Müller)* investigates the legal forms of the co-operation in the field of research. It offers a brief survey of the various—mainly contractual—forms of the co-operation, and of the agreements entered into in this connection, respectively, as well as of the CMEA documents. Further on, it analyzes in details the various forms of co-operation. The so-called elementar, loosest form of the co-operation is the co-ordination of researches. In this connection it treats—among other—the expedient legal conditions of the drafting of research plans, of the transfer of results, of the financing, of the supply of information. The legal form of the closer research co-operation is meant by the agreement entered into for the research co-operation. The characteristic stipulations—variants of stipulations—of such contracts are analyzed and valuated partly on the strength of the model agreements elaborated in the framework of CMEA. The importance of contractual stipulations relating to the enforcement of secrecy and the immaterial character of obtained results are especially emphasized. Also the system of warranties serving for the real fulfilment of contracts, the rules of guarantee and warranty are outlined. With respect to these latters, the observation of research risk is emphatically stressed when formulating the reasons of exemption (p. 59). Further on, the legal forms of research associations promoting a much closer co-operation, as well as their variants are investigated, such as the problems relating to the activity of research collectives, common laboratories, as well as the scientific-technical, moreover, scientific productional organizations having legal personality. (Namely, the "Assofoto" as proto-type of CMEA-level of the common scientific-productive organization established on the basis of bi-lateral agreement is introduced.) Finally, some conceptions relating to the stipulations of research assignment contracts are outlined.

Chapter IV analyzes the legal questions of the transfer and exploitation of results obtained in the course of the scientific-technical co-operation *(M. M. Boguslavsky–G. Schönfeld)*. The authors depart from the conception that the utilization and exploitation in the widest possible range of the achieved results is a social necessity, almost an order. The precondition of the realization of this requirement is that this approach should come into full display in the co-operational relations both on macro-level, inter-state level and on the level of economic organizations. In this connection the various contractual forms play important role. In the relation between the GDR and Soviet Union the legal principles of onerous exchange of scientific-technical results have been stated on the 5th meeting of govermental committee established on the basis of equality. Among the contractual forms, the licence agreements are of fundamental importance. Based partly on the model agreements elaborated in the framework of CMEA and partly on the practical experiences, the authors set forth the most

important problems in connection with licence agreements, namely the problems of contractual stipulations relating to the object of contract (e.g. know-how, the variants of the forms of protection), to the technical assistance, the improvements, the payment of compensation, the guarantees, the warranty, the liability, the secrecy, the provision for legal protection, the settlement of disputes, etc. The problems arising in connection with the gratuitous transfer of results, as well as with the licence trade carried on in common with third states are separately analyzed.

Chapter V *(M. M. Boguslavsky)* investigates the questions related to the legal protection of scientific-technical results. Following the general appreciation of the role of legal protection, as well as the introduction of the bi- and multi-lateral agreements, namely the Moscow and Havana treaties, the author surveys the organizational conditions of the protection. Further on, he treats the questions related to the specific protection of various kinds of scientific-technical results, to the variants of protection, mentioning especially the protection of inventions but analyzing at the same time the questions of discoveries, as well as the possibilities of protection provided for by the norms of copyright and the particular problems of the protection of software.

This comprehensive work of high level, well founded theoretically, (proved by the rich documentation based primarily—but not exclusively—on the results of German and Soviet legal literature) and extremely useful for the practice furnishes information not only on the bi-lateral relations but gives a good basis for each specialist investigating with general character the legal questions of CMEA integration.

E. Lontai

BONINI, R.: *Introduzione allo studio dell'età giustiniana* (Introduction into the study of the Justinian state) Patron Editore, Bologna, 1977. 130 p.

In the introduction of the book split up into seventeen chapters, giving motives for the choice of subject the excellent Italian romanist ascertains that the notion prevailing in the literature about the epoch of Justinianus is generally stereotyped. The fundamental intention of the work is to exceed these stereotypes. According to the author the rise of the predominant views can be attributed to the fact that the researches until now have approached this era abounding with cultural and political events excessively one-sidedly. Even the Justinian codification itself cannot be separated rigorously either from the economic and social events or from the intellectual tendencies being concomitants to this era. Until now scholars have given attention almost exclusively to the period extending until the completion of codification (i.e. till 534) of the epoch mentioned above. Even the significant changes appearing in the period following the publication of the Codex Iustinianus *repetitae praelectionis* have not been taken into consideration. In this way also the codification itself has actually been isolated. It is a subsequent problem that the researchers of this period (*viz.* jurists and historians) have scrutinized the characteristics of this time on the basis of a definite range of sources, i.e. that of legal and non-legal sources.

In Chapter One of the book the first period of Justinianus's life and career exceeding until his accession to the throne is analyzed. Flavius Petrus Sabbatius Iustinianus (by his full name) was born in 482, in all probability of a family of Thraco-Illyrian origine. Bonini criticizes the view supposing him by reasons of one of the passages of Vita Iustiniani fastened on Theophilus Abbas to be of Slavic origine (as recently e.g. Sotiroff). The first information relating to Justinianus dates from 518. The deceased Anastasius I was namely succeeded on the throne electively by his uncle Justinus I in the same year. In the year of Justinus's accession Justinianus is promoted *illustris comes (domesticorum)* and in 521 he is elected consul. The relation between Justinus and Justinianus is problematical among historians. The standpoint supposing that Justinianus can be regarded as actual monarch and so the beginning of his reign can already be reckoned from his uncle's accession to the throne, is disputed by Bonini. Justinianus obtains the dignity of *nobilissimus* exceedingly late, *viz.* in 526, and this fact must

not be forgotten. Also the title of Augustus he is granted only some months before his uncle's death, *viz.* in April 527. Treating the duration of Justinianus's reigning Bonini emphasizes that this long epoch embracing thirty eight years can be divided into several periods. As far as politics is concerned two significant eras can be separated. The first phase abounding with campaigns endures till 540. As to public administration, the fall of *praefectus praetorio Orientis* John the Cappadocian in 541 is a landmark. The second phase of Justinianus's reigning connects fundamentally with this year. This period is by no means abounding with military expansions insomuch as the previous one. Legislation fell relatively into the background in this period and this can to a high pitch be ascribed to Tribonianus's death in 542, too. This periodization is not necessarily satisfactory in respect of law as it does not distinguish on the basis of the Justinian codification. According to Bonini the first phase can be divided into two subsequent stages. Inside it the year 534 constitutes a caesura as year of completing the codification. The second stage of the first phase extending from 535 approximately to 541–542 is the period of creating the *Novellae constitutiones* and therefore it can be regarded as an independent period. The third phase is characterized by being thrust into the background of the legal development. The author is of the opinion that the literature has hitherto not given due attention to exploring characteristics of the second and third phase.

In the chapter treating the first Codex Iustinianus for the beginning the circumstances of creating the Codex are discussed. The sovereign promulgates his first code in the *constitutio "De novo codice componendo"* (or otherwise "*Haec quae necessario*"). The primary purpose of the corpus relying on the Codex Gregorianus, Codex Hermogenianus and Codex Theodosianus is to diminish the "*prolixitas litium*". The composition of persons entrusted with compilation is greatly diversified. Among the members of the commission can be found John the Cappadocian, who is the so-called *ex quaestor sacri palatii* at this time, item Tribonianus, as one of the six excellent officials, as simply "*vir magnificus magisteria dignitate inter agentes decoratus*", further Theophilus, who is simultaneously an antecessor of Constantinople law school and finally two "lawyers" of the judgement-seat of the *praefectus praetorio.*

This composition demonstrates definitely the predominance of bureaucratic factor as the representatives of theory or those of real legal praxis cannot be regarded to be instrumental in the commission. The Codex reached completion in a little over a year and consequently became valid already in 529. The author briefly refers to P. Oxy. 1814 published in 1922. Relying upon this we can conceive a notion of the conception dominating in the course of compiling the first Codex. This conception has not considered yet compiling of the material of the *ius.*

In the following chapter Bonini analyzes the history and the main characteristics of creating the Digest. The legislative work of the chancellery becomes even more active after the promulgation of the *constitutio "Summa rei publicae"* validating the Codex. The upward trend mentioned above is in a great part due to the activity of Tribonianus having meanwhile obtained the office of the *quaestor sacri palatii.* One of the important characteristics of the Digest promulgated by the *constitutio "Tanta"* December 16, 533 is the prohibition on commenting already included in the *constitutio "Deo auctore".* The author supposes the number of jurisconsults cited in the Digest to amount to 39 as Venuleius Saturninus and Claudius Saturninus must be regarded to be two different persons. At the end of the chapter Bonini expresses appreciation for the significance of the *littera Florentina* among the remained manuscripts of the Digest. Analyzing the problem of the interpolations the author refers to the fact that the authorization to that was denoted by the well-known place in the constitution "Tanta" i.e. "... quia multa et maxima sunt, quae propter utilitatem rerum transformata sunt". The method of interpolation research goes back to the 16th century, *viz.* the discovery of the "*emblemata Triboniani*" is due to the French humanists. It is owing to Kaser and Wieacker that the significance of interpolation research has to some extent been relegated to the background at the present time. Bonini fully treats the thesis put forth by Bluhme in 1820 supposing the particular fragments of the Digest were arranged according to a definite system. The fragments connecting with the *ius civile* constitute the so-called Sabinus Body, to the memory of the work entitled "*Tres libri iuris civilis*" of the jurisconsult. The so-

called Edictum Body indicates the connection with *ius honorarium*, while finally the Papinianus Body relates to the highly respected jurisconsult's writings having a casuistic nature. The less significant fourth part is constituted by the so-called Appendix comprising material dating from the period after Papinianus. In the early years of our century Bluhme's thesis met with critics mainly in the German literature. The common ground of Hofman's, Ehrenzweig's and Peter's opinions is the supposing of the existence of a codification having a private character in the 5th century constituting the basis of the compilators' work. In the 20s of this century also the great representatives of Italian romanistics (chiefly De Francisci, Arangio-Ruiz and Albertario) take in certain respect the supposition of the mentioned German romanists for basis, although they fundamentally remain henceforward followers of Bluhme's theory. In the last years, however, the predigest conception is pushed more and more into the background and therefore—perhaps apart from Guarino's conception—we may with good reason speak about the renaissance of Bluhme's theory. Bonini analyzes with full particulars Honoré's conception, which in many respects seems to be well-founded, but still requires further part-researches. Moreover, Verrey's opinion on the separation of the two stages of the compilation merits attention.

In the following chapters Bonini discusses Justinianus's "classicism", the Institutes and in relation to that the reform of legal teaching, the *Codex repetitae praelectionis*, the Justinian Novels, the legal basis of the imperator's power and in relation to that the political ideology. In the subsequent chapters the author analyzes the peculiarities of the law of the Justinian epoch not omitting to scrutinize even procedure law. The parts of the book examining the work of the sovereign's "collaborators" are also highly enlightening. Bonini dissects the activity of John the Cappadocian with special circumstantiality, who owes his brilliant career principally to his official relation to the heir to the crown and imperator. The role of the *questores sacri palatii* holding practically the function of the minister of justice is discussed in a special chapter. The author emphasizes Tribonianus's insisting on Latin, bringing on the inconsiderable part of the Greek element in the codification. Tribonianus's successors in the mentioned function are Iunillus (perhaps Iunilus or Iunilius) Africanus being far less learned than his predecessor in his office, and Constantinus, who continued in his office probably after Justinianus's death as well. In the lest chapter Bonini reviews the literary sources of the Justinian era.

The book elaborating far-reaching material and manifesting profound knowledge of the sources is a valuable contribution to the complex and comprehensive treatment of the mentioned epoch. On the basis of Bonini's work supplemented with a valuable bibliography the reader interested in the Justinian era obtains a summary rich in ideas about the period in question. The method with which the author formulates his conclusions objectively and takes the available sources for basis in each chapter of his book is by all means to be lauded.

G. Hamza

MEYER-TERMEER, A. J. M.: *Die Haftung der Schiffer im griechischen und römischen Recht.* Studia Amstelodamensia ad epigraphicam, ius antiquum et papyrologicam pertinentia XIII. Terra Publishing Co., Zutphen, Holland, 1978. IX + 290 p.

In Part One of her book the Dutch authoress deals with the perplexed problem of Greco-Egyptian contracts of shipment, in Part Two the problems of shipment transactions and those of the *receptum nautarum* in Roman law are discussed, finally the relation between the Greco-Egyptian and Roman legal regulation is analyzed in Part Three.

The range of documents, *viz.* papyri concerning the contract of shipment of Greco-Egyptian law, i.e. *naulitikai syngraphai* extends from the middle of the 3rd century B. C. until the 6th century A. D. The employer of carriage by ship is either an individual or the state itself. The shipping contractor,

i.e. the *naukleros* appears as agent. It is a part of the duties of the *naukleros* (who is the ship owner, too, in a number of cases) to conclude a contract of shipment with the employer and to assume liability for the carriage. His presence in ship is not required because the practical duties are discharged by the—using the technical term of Roman law—*magister navis (kybernetes)*, who also subscribes the *naulitike syngraphe*. Occasionally the *naukleros* discharges also the *kybernetes'* duties (see e.g. P. Hib. I 39). This, however, does not mean that the difference between both functions would fully disappear. The author also treats the much discussed question of the *misthoprasia* concluded for 50–60 years. The very reason shy this lease construction—which is reminiscent in terms of its consequences of sale and purchase—was applied, could be that the hirer out (i.e. the *kyrios*), who remained henceforth pro forma owner, was exempted from the *munera publica*.

As to the problem of liability concerning carriage, it demands an overall regulation. If the state itself appears as employer, unlimited liability is *ope legis* imposed on the shipping contractor. The unlimited liability, however, is also often emphasized in a special clause referring expressedly to that, *viz.* in the *naulitike syngraphe*. This liability of the contractor is confirmed with a special oath, as reported on by some sources. Besides the guaranties mentioned above also sponsors appear from the epoch of Antonius Pius. Not only the state but also the individual employer stuck to adequate guaranties. The clause, which has a preventive and at the same time a repressive effect, takes a great part in connection with these contracts, too. There is consequently no difference depending on who fills the function of employer, regarding the degree of liability. Analyzing the legal nature of *naulitikai syngraphai*, the author arrives at the conclusion that those come under the category of *misthosis*. According to modern legal terminology *misthosis* embraces the lease contract, the labour contract, the paramone, the so-called *locatio conductio operis*, the nurse contract and the contract of affreightment. The theoretically unlimited liability of the contractor remained unchanged for several centuries. Limiting liability as far as the contractor is exceptionally not held responsible for vis maior, the P. Oxy. I 144 documents in fact the above thesis. The author criticizes the view in literature (represented e.g. by Mitteis, Arangio-Ruiz and Börner) supposing that the contractor's liability was limited relating the persons concerned.

In the introductory part of the chapter analyzing the contract of shipment and the *receptum nautarum* in Roman law the author stresses that in the beginning shipping did not play an important role in ancient Rome. From the 3rd century B. C. the significance of maritime trade increased considerably in the economic life of Rome. For the oversea carriage of the *annona* the state needed also the services of private persons. The individual shipping contractors obtained important privileges, among which the grant of Roman citizenship and the *immunitas* from *munera publica* were striking. A complete change occurred in the social position of *navicularii* from the epoch of Diocletianus. In the time of the Dominatus there was no word of contractual relation any more between the state and the shipping contractor but the subordination became a decisive factor. No doubt, however, the *navicularii* had got certain privileges in this period: so e.g. the *lex Papia Poppaea* did not pertain to them and the *vocatio tutelae* was due to them. The shipping contractor, i.e. the exercitor, just like in Egypt, could be equally the owner or the charterer of ship. It was his duty to employ the *magister navis* and occasionally to enter into a contract of shipment with a third party. If the *exercitor navis* contracted with a third party, in this case according to the nature of contract he was entitled to bring *actio locati* or *actio conducti*. Further the shipping contractor could make a special guaranty contract with the employer in the name of the *exercitor*, the so-called *receptum nautarum*. To discharge the technical duties, however, was the task of the *magister* or the so-called *gubernator*. *Navicularius*, occurring occasionally in the sources, is a synonymous term with *exercitor*.

The shipping contractor's liability conformed to the general rules of *locatio*, i.e. liability for *dolus* and *culpa* was imposed on the employer. Strict liability was stipulated with the *receptum nautarum* connected with lease contract being nevertheless independent. The *exercitor* made the *receptum* "contract" itself or he commissioned the *magister navis* or accidentally another person, e.g. the *diaetarius*. In this case, too, it was possible to bring *actio ex recepto* against the *exercitor*

immediately. A certain kind of the transmission of liability is not mentioned in the sources, e.g. if it is not the *exercitor* who contracts directly with the employer. When namely the party adversely affected might claim damages against the *exercitor* by the right of *receptum* concluded with the *magister*, there was no word of bringing action either against the *magister (actio ex recepto)* or the *exercitor (actio [ex recepto] exercitoria)*. (See Gai. Inst. 4.71.; D.41.1.; C.4.25.) As to the time of the coming into being of the *receptum nautarum*, the authoress ascertains that it is to be dated to the period between the appearance of the *locatio conductio* and the time of Ofilius' activity. It is implausible that this kind of *receptum* would already be known before the 2nd century B. C. Analysing the scope of application of the *receptum* the authoress takes the view that it is not limited to the cases of the *locatio conductio rerum vehendarum* only, as supposed e.g. by Brecht. Mayer-Termeer further opines that this kind of *receptum* was exclusively possible in the case of mandate charged by a private person. As to the degree of liability resulting from the *receptum*, the authoress thinks that liability also embraced the risk of damage until Labeo. She considers the expression in D.4.9.3.1. (Ulp.) excluding *damnum fatale* from liability to be a subsequent addition. Labeo excepts only the cases of *naufragium* and *vis piratarum* from liability. Examining the legal characteristics of *receptum* the authoress ascertains that it became totally independent from the *locatio conductio* and that is why it did not change into an ex lege guaranty clause even in the Justinianean law. That constitutes in fact the basis of the principal difference between the Greco-Egyptian and Roman legal regulation on the shipping contractor and simultaneously that is why the derivative problem cannot be solved unambiguously and scholarly, as explained by the authoress in the last chapter.

Mayer-Termeer's book is exemplary not only in terms of the elaboration of the ample source material but it can also serve as a methodological instruction to writing up similar legal institutions of ancient laws, as far as the analysis of a given institution is concerned.

G. Hamza

Acta Juridica Academiae Scientiarum Hungaricae, Tomus 24 (3—4), p. 445 (1982)

Bibliographia

We apologize that the recent issue, due to technical reasons, exceptionally does not contain a bibliography.

The Editors

INDEX

Informationes

Recensiones

Varia

Internationalia

Bibliographia

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